Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

FRANCIS E. KEPPLE,
Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,
Respondent.

On Petition for a Writ of Certiorari to the New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an important question concerning whether the States, in enacting their own wiretapping statutes, are observing the requirements of the federal wiretapping statute and complying with that statute's restrictions and limitations. The decisions of two state courts of last resort[1] are in direct conflict with the decisions of the highest courts of two other States and one federal district court[2] over one of the principal issues raised herein.

The federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511-2522 (2000), sharply limits the types of crime for which the States may authorize their law enforcement personnel to employ wiretapping and electronic surveillance in the investigation and detection of crime. Although the list of crimes for which the *federal* government may utilize electronic eavesdropping is quite lengthy, 18 U.S.C. § 2516(1), the federal wiretapping statute expressly restricts the States' use of wiretapping and electronic surveillance to the crimes of "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs," or "other crime dangerous to life, limb, or property," or conspiracy to commit any of the

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[1] *State v. Kepple*, – N.H. –, 866 A.2d 959 (2005) (the instant case); *Commonwealth v. Birdseye*, 543 Pa. 251, 670 A.2d 1124 (1996).

[2] *State v. Rivers*, 660 So. 2d 1360 (Fla. 1995), *cert. denied*, 516 U.S. 1147 (1996); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980); *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.) (reviewing Pennsylvania state wiretapping statute), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988).

foregoing offenses. 18 U.S.C. § 2516(2). By contrast, New Hampshire's wiretapping statute, N.H. Rev. Stat. Ann. ch. 570-A, purports to authorize wiretapping in conjunction with a broad array of crimes as to which Congress plainly did not intend to allow the States to engage in wiretapping, including hazardous waste violations, harassing or obscene telephone calls, computer pornography, child exploitation, securities law violations, corrupt practices in public office, witness-tampering, hindering apprehension or prosecution, escape, bail-jumping, solid waste violations, insurance fraud, simple drug possession, and all manner of petty theft offenses, including larceny, receiving stolen property, conversion, theft by deception, and theft of services. N.H. Rev. Stat. Ann. §§ 570-A:2(II) (d); 570-A:7; 637. In the trial court and in the New Hampshire Supreme Court, the petitioner argued unsuccessfully that the New Hampshire wiretapping statute was unconstitutional on its face due to overbreadth, citing such cases as *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873 (1967), and *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980), in that the New Hampshire statute contravened the essential scheme of Title III and vastly exceeded the latter statute's mandate to the States. The petitioner urged that the New Hampshire act gave that State's law enforcement officials a virtual *carte blanche* to utilize wiretapping in conjunction with practically any crime that they chose, and that the act therefore violated the federal wiretapping statute and, ergo, the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

Secondly, even if not unconstitutional on its face, an issue exists as to whether the New Hampshire wiretapping statute is unconstitutional as applied to this case. Specifically, the petitioner contends that wiretapping and electronic eavesdropping cannot lawfully be used by a State in conjunction with nonviolent sex crimes (*e.g.*, statutory rape,

prostitution, consensual sex between a prison guard and an inmate, and the like) wherein no force, violence, or threat thereof is used, for such crimes are not among the specific ones enumerated in 18 U.S.C. § 2516(2) as offenses as to which the States may employ wiretapping, nor do they fall within the rubric of "other crime dangerous to life, limb, or property" as set forth in that statute. *Id.* The decisions of four state courts of last resort and one federal district court are sharply divided on this issue. *See* notes 1 & 2, *ante*.

Thirdly, when they implemented their wiretap in this case the State's law enforcement authorities disregarded the procedural restrictions imposed by the federal wiretapping statute with respect to "other crimes" evidence gathered in the course of implementing an otherwise valid wiretap, and the New Hampshire Supreme Court ignored the defect. Both 18 U.S.C. § 2517(5) and its New Hampshire counterpart, N.H. Rev. Stat. Ann. § 570-A:8(V), require that whenever in the course of executing an otherwise valid wiretap authorization the State obtains evidence of crimes *other than* the offenses for which the authorization was given and intends to use the gathered evidence to prove the commission of such other crimes, the State must apply "as soon as practicable" to a judge of competent jurisdiction for approval of such use and for a determination that the contents of the communication were otherwise lawfully intercepted. In this case, the New Hampshire Attorney General's authorization approving the police's application for a wiretap approved its use only in conjunction with the crime of aggravated felonious sexual assault. However, the State subsequently used the contents of that intercept to obtain indictments for and prove at trial not only that crime, but also the crimes of criminal solicitation and endangering the welfare of a minor. It is undisputed that the State never applied to any judge, at any time, for permission to use the fruits of the wiretap in support of its

proof of the latter crimes. This case tests the integrity of the federal wiretapping statute's requirements concerning "other crimes" evidence, as applied to the States.

Finally, the primary basis upon which the New Hampshire Supreme Court affirmed the petitioner's convictions was that since, as a matter of *federal* law, it is not unlawful to secretly tape-record a telephone conversation so long as at least one party to the conversation consents to the recording, the intercept in this case was legal, and therefore the State was not bound by the restrictions as to the types of crime for which electronic eavesdropping may be used or by the other procedural restrictions imposed by the federal wiretapping statute. Although it is undeniably true, so far as it goes, that as a matter of federal law it is legal to secretly record a telephone conversation if the person recording it is an actual party to that conversation and/or consents to the recording, 18 U.S.C. § 2511(2) (c), it has long been thought to have been settled that whenever a State chooses to enact its own wiretapping statute its state law enforcement personnel must observe all of the minimum procedural protections and restrictions of *both* the federal wiretapping statute *and* that State's own wiretapping statute. *E.g., United States v. McNulty*, 729 F.2d 1243, 1264 (10th Cir. 1984) (en banc); *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976); *United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). It would logically seem to follow that by enacting its own wiretapping statute, the State of New Hampshire bound itself to the restrictions as to the types of crime for which wiretapping may be used by the States, as imposed by the federal wiretapping statute, 18 U.S.C. § 2516(2). The State of New Hampshire has enacted a wiretapping statute which generally prohibits all secret tape-recording of telephone

conversations, with only a few specified, highly restrictive exceptions. The issue presented is whether New Hampshire or any other State, having imposed such restrictions and limitations, can now attempt to proceed as if it had enacted no wiretapping statute at all.

PARTIES TO THE PROCEEDING

The petitioner, Francis E. Kepple, is a resident of the State of New Hampshire.

The respondent is the State of New Hampshire. It is being represented by the Attorney General of New Hampshire.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Francis E. Kepple, respectfully petitions this Court for a writ of certiorari to review the decision and opinion of the New Hampshire Supreme Court, entered on January 24, 2005.

OPINIONS BELOW

The official version of the opinion of the New Hampshire Supreme Court has not yet been published in the New Hampshire Reports, but the unofficial version published by the West-Thompson Publishing Group is being reported in the Atlantic Reporter (Second Series) at 866 A.2d 959. It is also reproduced herein in Appendix A. The opinion of the trial court (the Superior Court of Rockingham County, New Hampshire), disposing of the petitioner's motion for suppression, has never been published, but it is reproduced in Appendix B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The petitioner seeks review of a final judgment and decision of a State's court of last resort, and he asks this Court to review that decision via writ of certiorari on the basis that a statute of that State is repugnant to a law of the United States. The New Hampshire Supreme Court's decision was entered on January 24, 2005.

STATUTES INVOLVED

The statutes pertinent to this petition for certiorari are lengthy, and they are reproduced in the Appendix. They are as follows:

18 U.S.C. § 2511(2) (c) (2000)
18 U.S.C. § 2516(2) (2000)
18 U.S.C. § 2517 (2000)
N.H. Rev. Stat. Ann. § 570-A:2 (2001)

N.H. Rev. Stat. Ann. § 570-A:7 (2001)
N.H. Rev. Stat. Ann. § 570-A:8 (2001)
N.H. Rev. Stat. Ann. § 632-A:2 (1996 & Supp. 2002)
N.H. Rev. Stat. Ann. § 629:2 (1996 & Supp. 2002)
N.H. Rev. Stat. Ann. § 639:3 (1996)

STATEMENT OF THE CASE

A. Factual Background

This was a state criminal proceeding in which the petitioner was charged with four separate offenses, all arising from the same incident. The petitioner was indicted for aggravated felonious sexual assault (two counts), criminal solicitation, and endangering the welfare of a child. (The indictments are reproduced in Appendix C.) The State alleged, and on the evidence presented the jury would have been warranted in finding, the following facts:

Sometime in July 2001, the petitioner, Francis E. Kepple, invited the victim, a 15-year-old girl to whom he was distantly related by marriage, to earn some money by assisting him in doing some cleaning work in a house which he was in the process of renovating in Raymond, New Hampshire, pursuant to his employment as a handyman. (Transcript of Trial Proceedings, Vol. I, p. 53 [hereinafter cited in the following form: "I Tr. 53"].) She accepted the invitation, and on the appointed date he picked her up at her home and drove her to the Raymond house. (I Tr. 53-55.) While she was in the process of cleaning the house, she stumbled upon an unopened bottle of vodka, which was in one of the cabinets. (I Tr. 57.) At the trial the State strongly intimated, and there was evidence to support the conclusion, that Mr. Kepple had deliberately "planted" the bottle of alcohol in the drawer, for he knew by virtue of his familial relationship with the victim that she had a serious alcohol problem, and he hoped to tempt her into ingesting the vodka and becoming intoxicated so that

she would be in a pliant, submissive state. (I Tr. 8, 57-58.) Whether deliberately orchestrated or not, she submitted to the temptation and drank a substantial portion of the contents of the bottle. (I Tr. 95-96.) She then became sick and inebriated, and so she decided to lie down. (I Tr. 59-63.) While she was lying down on a bed in a basement bedroom, Mr. Kepple pulled off her pants and performed oral sex (cunnilingus) on her. (I Tr. 64-67.) The victim, having ingested a third to half a bottle of vodka within a matter of a mere hour or two, did not resist Mr. Kepple's actions, partially because of simple shock and fear, partially because of her weakened state, and partially because she was too inebriated to be fully cognizant of her surroundings or to comprehend the nature of Mr. Kepple's actions. (*Id.*; I Tr. 72.)

Toward the end of the incident, after he had performed oral sex upon her, Mr. Kepple pulled down his own pants and invited the victim to have sexual intercourse with him. (I Tr. 67-69.) At that point, the victim was beginning to recover from the effects of the alcohol and to regain full awareness of her surroundings. (I Tr. 69-70.) Finally realizing what had happened and realizing the import of Mr. Kepple's remarks, she abruptly got up from the bed, pulled on her pants, and ran from the room, before any action had been taken on Mr. Kepple's invitation. (*Id.*) She fled the house, ran down the street, and eventually made her way back home without further incident. (I Tr. 70-73.)

It is undisputed Mr. Kepple never used any threats, force, or violence during the course of this incident. The State has never contended otherwise, and in fact the victim herself directly conceded as much during her cross-examination at trial. (I Tr. 118-121.)

The victim did not initially report the incident to the police, and it did not finally come to their attention until several months later, when the victim confided it to a girlfriend at her high school, who in turn related the incident to the school's guidance counselor, who in turn contacted the authorities. (I Tr. 77-80; II Tr. 27, 29-31, 37-42, 46-48.) Perhaps sensing that in its present state their case against Mr. Kepple was somewhat weak, the police decided to orchestrate a secretly tape-recorded telephone conversation between Mr. Kepple and the victim. (II Tr. 52-58; Ex. #2; App. D, I.) Acting under color of the New Hampshire wiretapping statute and the procedure outlined therein, N.H. Rev. Stat. Ann. § 570-A:2(II) (d), the police and the local prosecutor applied for and were granted permission from an appropriate assistant attorney general in the office of the Attorney General of New Hampshire to conduct a species of wiretap known under local practice as a "one-party intercept," which means simply that the police, with the victim's consent and knowing participation, would secretly tape-record a telephone conversation between the victim and Mr. Kepple. (*Id.*) Although initially challenging the State's compliance with the statutory procedure required under state law and although continuing to contest the validity of the New Hampshire wiretapping statute itself, the petitioner now concedes that the State complied with the statutory procedure for obtaining the authorization, at least in the first instance.

However, in the required written memorandum memorializing the authorization (*see* N.H. Rev. Stat. Ann. § 570-A:2(II) (d)), the assistant attorney general named only "Aggravated Felonious Sexual Assault" as the offense as to which the intercept was being authorized. (App. 24a.) No mention was made of the crimes of criminal solicitation or endangering the welfare of a child (*id.*), nor are those crimes listed among those for which wiretapping and electronic

eavesdropping may be utilized, either in the federal wiretapping statute or in the New Hampshire wiretapping statute itself. 18 U.S.C § 2516(2); N.H. Rev. Stat. Ann. §§ 570-A:2(II) (d), -A:7. Further, at no time did the State ever apply to any judge, after the one-party intercept was successfully implemented, to obtain ratification for the use of the secretly-recorded telephone conversation in the prosecution of the other crimes not named in the memorandum (*viz.*, criminal solicitation and endangering the welfare), in accordance with the procedure set forth in 18 U.S.C. § 2517(5) and N.H. Rev. Stat. Ann. § 570-A:8(V). The State subsequently introduced into evidence the entire contents of the tape-recorded telephone conversation at the trial of this action. (II Tr. 58-61; App. 56a-61a.) That evidence was admitted generally. (*Id.*) No request was made by the State for a limiting instruction from the court, limiting the jury's consideration of that evidence, nor was any other attempt made by the State to limit that evidence's use to the two principal charges of aggravated felonious sexual assault, as opposed to the two ancillary charges of criminal solicitation and endangering the welfare of a child. (*Id.*) It is undisputed that no judge of competent jurisdiction ever expressly approved the use of the intercept with respect to the charges of criminal solicitation and endangering the welfare of a child or ever made a determination that the evidence was otherwise lawfully obtained, either before the indictments were issued or at any other time. *See* 18 U.S.C. § 2517(5); N.H. Rev. Stat. Ann. § 570-A:8(V).

By this time it is also reasonably clear that in addition to introducing it into evidence at trial, the State also disclosed the substance of the one-party intercept to the grand jury and used it to help procure all four indictments: all four were signed by the same grand jury foreman and by the same deputy Rockingham County Attorney, and on the same date.

(App. C.) Presumably, the evidence supporting all four indictments was simply lumped together and presented to the grand jury in the same sitting. (*Id.*) At least, the State has never denied this, despite having been given ample opportunity to do so. During the pretrial proceedings in this case, Mr. Kepple asked the State repeatedly to either affirmatively admit or affirmatively deny that the fact of the intercept and its essential substance were disclosed to the grand jury. (Transcript of Hearing on Motion to Suppress at 26-28; *and see* Defendant's Motion to Order Transcript of Grand Jury Proceedings (App. G).) Under 18 U.S.C. § 3504(a) (1), the government is required to either affirm or deny directly that the fruits of electronic eavesdropping were disclosed to the grand jury, whenever a defendant claims that a wiretap was unlawfully obtained and/or disclosed. *See Gelbard v. United States*, 408 U.S. 41, 54-58, 92 S. Ct. 2357, 2364-66 (1972); *In re Evans*, 452 F.2d 1239, 1242 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972). This the State never did.

B. Preservation of Federal Questions for Review

Prior to trial, Mr. Kepple filed a timely motion to suppress all evidence of the tape-recorded telephone conversation and all derivative evidence. (App. 42a-51a.) With the exception of one issue which the State itself raised for the first time on appeal (and which will be addressed separately below), all of the federal issues which Mr. Kepple presently raises in his instant petition for certiorari were asserted by him in that motion. (The motion itself is reproduced in Appendix F.)

Disregarding those contentions which he eventually conceded or abandoned, Mr. Kepple based his motion on essentially three grounds: (a) that the New Hampshire wiretapping statute is unconstitutional on its face for

overbreadth, in that the lengthy roster of crimes as to which the New Hampshire statute purports to authorize wiretapping by its state law enforcement authorities vastly exceeds the far more limited list mandated to the States by the federal wiretapping statute; (b) that the New Hampshire wiretapping statute is unconstitutional as applied to this case, in that the federal wiretapping statute does not allow the States to employ wiretapping in conjunction with sex crimes in which no force, violence, or threat of same is used; and (c) that the State violated the procedures of both the federal wiretapping statute and the State's own wiretapping statute with respect to the "other crimes" of criminal solicitation and child endangerment, in that, assuming *arguendo* that the statute is constitutional and that the wiretap was lawfully implemented in the first instance, the State never applied to a judge, either "as soon as practicable" or otherwise, 18 U.S.C. § 2517(5); N.H. Rev. Stat. Ann. § 570-A:8(V), for permission to use the contents of the wiretap before disclosing it to the grand jury to obtain the indictments or before introducing it in support of the charges for those offenses at trial. (App. 42a-51a.)

In Mr. Kepple's motion on its face, the federal underpinnings of the last of the three aforementioned issues (*viz.*, failure to obtain advance approval for use of "other crimes" wiretap evidence) were not well-developed, and it may have appeared that the petitioner was relying exclusively on state procedure. However, in the memorandum of law which he submitted in support of his motion for suppression the petitioner made it clear that he was relying on the minimum procedural requirements of the federal wiretapping statute as well as those of its substantially-similar New Hampshire counterpart. A representative passage from that memorandum is as follows:

> The State has failed to comply with its own statutory procedure for applying for, approving,

> implementing, and disclosing the contents of oral communications recorded by means of a one-party intercept. In so doing, it has similarly failed to observe the minimum standards established by the federal wiretapping statute, 18 U.S.C. § 2510 *et seq.* Therefore, all evidence of the one-party intercept must be suppressed.
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> * * * [T]he State has failed to apply to this Court, either "as soon as practicable" or otherwise, for permission to use the evidence which it gathered via the one-party intercept in the prosecution of the indictments for criminal solicitation and endangering the welfare of a minor, as is required by RSA 570-A:8, V and its federal counterpart, 18 U.S.C § 2517(5). This oversight is a fundamental defect which renders the intercept unlawful and requires suppression of the evidence. [Citing several reported federal decisions, including *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975).]

Memorandum in Support of Defendant's Motions to Suppress at 23-24; *see also id.* at 21-22. Indeed, one of the petitioner's consistent themes throughout the state court proceedings, relying on seemingly-settled law established by longstanding case decisions of the United States courts of appeals, was that whenever a State chooses to enact its own wiretapping statute, the State and its law enforcement personnel must comply with the minimum procedural requirements of *both* the federal wiretapping statute *and* the State's own statute. (*Id.* at 18-20, *citing, inter alia, United States v. McNulty*, 729 F.2d 1243, 1264 (10th Cir. 1984) (en banc); *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976); *United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075

(1977).) Accordingly, though not as fully developed as it might have been in the motion for suppression itself, the federal issue relating to "other crimes" evidence was clearly called to the trial court's attention and preserved for review in the petitioner's supporting memorandum.

The trial court denied the petitioner's motion for suppression in a written order and opinion dated April 10, 2003. (App. B.) Rejecting the petitioner's arguments to the contrary, the motion judge[3] reasoned that despite the fact that no violence, force, or threat thereof had been used by the petitioner during the course of committing the charged incident, the crime as to which the wiretap had been authorized constituted a "danger to life," due to the possibility of transmission of AIDS and "other life-threatening diseases" through sexual contact. (App. 10a-11a.) Therefore, the motion judge reasoned, it fell within the "crime dangerous to life, limb, or property" rubric of subsection (2), 18 U.S.C. § 2516. (App. 10a-11a.)

The motion judge embraced this reasoning virtually *sua sponte*, for in its written opposition to Mr. Kepple's motion for suppression the State never mentioned AIDS or any other sexually transmitted disease as a basis for adjudging nonviolent sexual conduct to be "crime dangerous to life, limb, or property," 18 U.S.C. § 2516(2), and such a proposition was mentioned by the prosecutor only in passing during the hearing on the motion. (Transcript of Hearing on Motion to Suppress at 31-32.) But in any event, the petitioner subsequently dispelled this reasoning in the New Hampshire Supreme Court, where he cited extensive medical authorities

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[3] The judge who entertained the petitioner's motion for suppression was not the same judge who presided over his trial on the merits.

and studies which demonstrate that the statistical odds of contracting the HIV virus as the result of a casual, isolated, one-time-only heterosexual encounter amount to only a few hundredths or thousandths of a percentage point, *even if one's sexual partner is fully infected with the HIV virus;* that the odds of contracting it as the result of an encounter between two randomly-selected individuals in the general population are obviously even smaller; and that the odds of contracting AIDS through *oral* sex are practically nonexistent.[4] (Brief for

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[4] Kenneth H. Mayer, M.D., *Transmission, Pathogenesis, and Natural History, in* HIV 7 (Howard Libman, M.D. & Harvey J. Makadon, M.D. eds., 2d ed. 2003); Felissa R. Lashley, *The Etiology, Epidemiology, and Natural History of HIV Infection and AIDS, in* THE PERSON WITH AIDS 18 (Jerry D. Durham & Felissa R. Lashley eds., 3d ed. 2000); Roy M. Anderson, FRS, *Transmission Dynamics of Sexually Transmitted Infections, in* SEXUALLY TRANSMITTED DISEASES 25-27 (King K. Holmes, M.D. et al. eds., 3d ed. 1999); David O. White & Frank J. Fenner, MEDICAL VIROLOGY 555 (1994); Sandra R. Wilson et al., *Correlates of Sexual Risk for HIV Infection in Female Members of Heterosexual Latino Couples: An Application of a Bernoulli Process Model*, 7 AIDS AND BEHAVIOR 273 (2003); N.S. Padian et al., *Heterosexual Transmission of Human Immunodeficiency Virus (HIV) in Northern California: Results from a Ten-Year Study*, 146 AM. J. EPIDEMIOLOGY 350 (1997); T. Mastro & I. de Vincenzi, *Probabilities of Sexual HIV-1 Transmission*, 10 AIDS (Supp. A) S75-S82 (1996); A.M. Downs & I. de Vincenzi, *Probability of Heterosexual Transmission of HIV: Relationship to the Number of Unprotected Sexual Contacts*, 11 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME HUMAN RETROVIROL 388 (1996); K.H. Mayer & D.T. Anderson, *Heterosexual HIV Transmission*, 4 INFECTIOUS AGENTS & DISEASE 273 (1995); Jorge del Romero et al., *Evaluating the Risk of HIV Transmission Through Unprotected Orogenital Sex*, 16 AIDS 1296 (2002); Diane C. Shugars, M.D. et al., *Saliva and Inhibition of HIV-1 Infection: Molecular*

Defendant at 53-55; Defendant's Reply Brief at 5-7.) The State never further pursued this argument, and the New Hampshire Supreme Court did not rely on the motion judge's rationale in its subsequent decision on appeal.

The motion judge also found, summarily, that "[t]he crime of aggravated felonious sexual assault, in particular, is an inherently dangerous offense to life and limb." (App. 10a.) In so doing, however, he skirted one of Mr. Kepple's principal arguments: that "aggravated felonious sexual assault," as defined by the relevant New Hampshire statute, N.H. Rev. Stat. Ann. § 632-A:2, encompasses both violent *and* nonviolent sexual conduct, such as statutory rape and consensual sexual intercourse between, for example, a prison guard and an inmate or a professor and a student. Regardless of whatever may be said about them from the standpoint of morals, the latter types of crime are simply not "crime dangerous to life, limb, or property". Therefore (as the petitioner later argued in the New Hampshire Supreme Court), it is circular reasoning to posit that the crime of "aggravated felonious sexual assault" is inherently dangerous to life and limb, without further elaboration.

At trial, Mr. Kepple timely objected to the introduction of the tape-recorded telephone conversation into evidence at the time that it was offered, and he moved for a mistrial both

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Mechanisms, 8 ORAL DISEASES 169 (2002); David A. Hawkins, *Oral Sex and HIV Transmission*, 77 SEXUALLY TRANSMITTED INFECTIONS 305, 307-08 (2001); Associated Press news item, *HIV Infection from Receptive Oral Sex is Rare Event, UC San Francisco Study Confirms* (Aug. 14, 2001) *available at* www.cdcnpin. org, News Record #33130; Diane C. Shugars & S.M. Wahl, *The Role of Oral Environment in HIV-1 Transmission*, 129 J. AM. DENTAL ASS'N 851 (1998); Richard B. Rothenberg et al., *Oral Transmission of HIV*, 12 AIDS 2095 (1998).

immediately before and immediately after the recording was played to the jury. (II Tr. 58, 61 (App. 58a-61a).) The trial court overruled his objection and denied his motions for a mistrial. (*Id.*) Mr. Kepple was convicted on all for indictments, and he appealed. The New Hampshire Supreme Court affirmed his convictions in a written opinion dated January 24, 2005 (App. A), albeit it did so on grounds somewhat different from those relied-upon by the trial court when it denied his motion for suppression.

On appeal, the State raised for the first time an argument which the New Hampshire Supreme Court subsequently adopted in its decision affirming Mr. Kepple's convictions. Specifically, the State argued that because as a matter of federal law it is not illegal to secretly tape-record a telephone conversation so long as at least one party to the conversation consents to the recording, 18 U.S.C. § 2511(2) (c), the State was not bound by the limitations imposed by section 2516(2), 18 U.S C., as to the types of crime for which wiretapping and electronic eavesdropping may be utilized. The State had never previously raised this contention in any of the proceedings in the trial court.

For his part, Mr. Kepple re-raised all of the federal grounds for suppression that he had asserted in his motion to suppress in the trial court, and he filed a reply brief squarely addressing the State's newly-raised contention. His arguments in opposition to that contention are outlined in greater detail below, *post* at 26-30.

REASONS FOR GRANTING THE PETITION

This case draws into question whether the States are obeying the federal wiretapping statute and adhering to the restrictions and limitations imposed upon the States by that statute. In its landmark decision in *Berger v. New York*, 388 U.S. 41, 63, 87 S. Ct. 1873, 1885 (1967), this Court said:

"Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." Later, this Court observed that when Congress drafted and passed Title III, "the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48, 92 S. Ct. 2357, 2361 (1972) (footnote omitted). The State of New Hampshire has enacted a wiretapping statute which contravenes the essential scheme of the federal wiretapping statute and this Court's holding in *Berger*. The New Hampshire act gives that State's law enforcement officials an open-ended mandate to engage in wiretapping virtually any time that they want to, subject only to the supervision of the New Hampshire Attorney General.

Additionally, two state courts of last resort have reached conclusions opposite to those of the highest courts of two other States and one United States district court over the more narrow issue of whether wiretapping and electronic eavesdropping may be used in conjunction with the investigation and detection of a wholly nonviolent sex offense where it is undisputed that no force, threat, or violence was used. *Contrast State v. Kepple*, -- N.H. --, 866 A.2d 959 (2005) (the instant case), *and Commonwealth v. Birdseye*, 543 Pa. 251, 670 A.2d 1124 (1996), *with State v. Rivers*, 660 So. 2d 1360 (Fla. 1995), *cert. denied*, 516 U.S. 1147 (1996); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980); *and United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988). This Court has never previously offered guidance on this specific issue, and review via writ of certiorari is appropriate.

A. This Court Should Reaffirm the Vitality of *Berger v. New York* and Invalidate New Hampshire's Palpably Overbroad Wiretapping Act.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 (2000), strictly limits the types of offenses for which the States may utilize wiretapping in the investigation and detection of crime, limiting the States' use of that investigative technique to the offenses of "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs," or "other crime dangerous to life, limb, or property," or conspiracy to commit any of the foregoing offenses. 18 U.S.C. § 2516(2).

In contrast to this rather limited roster of crimes, the New Hampshire wiretapping statute purports to allow its law enforcement personnel to employ wiretapping in connection with

> organized crime, as defined in RSA 570-A:1, XI, or evidence of the commission of the offenses of homicide, kidnapping, gambling, theft as defined in RSA 637, corrupt practices as defined in RSA 640, child pornography under RSA 649-A, computer pornography and child exploitation under RSA 649-B, criminal conduct in violation of the securities law, as defined in RSA 421-B:3, 421-B:4, 421-B:5, 421-B:19, and 421-B:24, criminal conduct in violation of the security takeover disclosure laws, as defined in RSA 421-A:3, 421-A:7, 421-A:8, 421-A:11, and 421-A:13, robbery as defined in RSA 636:1, arson as defined in RSA 634:1, hindering apprehension or prosecution as defined in RSA 642:3, tampering with witnesses and informants as defined in RSA 641:5, aggravated felonious sexual assault as defined in RSA 632-A:2,

> felonious sexual assault as defined in RSA 632-A:3, escape as defined in RSA 642:6, bail jumping as defined in RSA 642:8, insurance fraud as defined in RSA 638:20, dealing in narcotic drugs, marijuana, or other dangerous drugs, hazardous waste violations under RSA 147-A:4, I, or any conspiracy to commit any of the foregoing offenses[,]

N.H. Rev. Stat. Ann. § 570-A:7, as well as solid waste violations, harassing or obscene telephone calls, and simple drug possession. N.H. Rev. Stat. Ann. §§ 570-A:2(II) (d), -(e). Only a fraction of the above-listed offenses are allowed by Title III to be the predicate for wiretapping by the States.

Furthermore, the foregoing list of offenses does not even begin to tell the full story of the New Hampshire statute's expansiveness. For example, in purporting to authorize wiretapping in connection with "theft as defined in RSA 637,"[5] the New Hampshire Legislature has authorized its law enforcement personnel to use wiretapping in connection with the full gamut of routine, run-of-the-mill, petty theft offenses, including simple theft, conversion, receiving stolen property, theft by deception, theft of services, unauthorized use of a vehicle, and larceny by a bailee. Similarly, the New Hampshire wiretapping statute's reference to "corrupt practices as defined by RSA 640" opens the door to wiretapping in conjunction with a host of low-level crimes which are not specifically mandated to the States by Title III and which do not even arguably qualify as "crime[s] dangerous to life, limb, or property" under its catch-all provision, 18 U.S.C. § 2516(2), such as "improper

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[5] "RSA" is the local citation format for New Hampshire Revised Statutes Annotated.

influence," "compensation for past action," "acceptance of a gift by a public official," and "compensation for services as a public official". N.H. Rev. Stat. Ann. §§ 640:4, -:6. Other examples abound.

In its decision affirming the petitioner's convictions in this case, the New Hampshire Supreme Court rejected Mr. Kepple's argument (as recast by the court) that the New Hampshire wiretapping statute is unconstitutional on its face "because it authorizes electronic surveillance for offenses that are not specifically enumerated in Title III." (App. 3a.) However, the New Hampshire court's depiction of Mr. Kepple's argument is hardly an apt characterization of the real issue. Far from purporting to authorize electronic surveillance merely for *some* offenses that are not specifically enumerated in the federal wiretapping statute, New Hampshire's wiretapping statute is virtually a *carte blanche* to that State's law enforcement authorities to conduct wiretapping and electronic eavesdropping whenever and wherever they want to, and in connection with virtually any crime they want to. Indeed, it would be almost as easy to list the offenses for which New Hampshire does *not* allow its law enforcement personnel to employ wiretapping than to catalog those for which it does.

Title III contemplates just the opposite: the list of crimes as to which wiretapping is allowed is supposed to be very short, and the list of crimes as to which it is forbidden is supposed to be very long. Consistent with the legislative history of Title III, S. Rep. No. 1097 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, pp. 2153, 2177, 2186-87, this Court and the lower federal courts have said on numerous occasions that Congress intended wiretapping to be reserved for only the most serious crimes. *United States v. United States District Court*, 407 U.S. 297, 304, 92 S. Ct. 2125, 2130 (1972) ("These offenses are described [by

Congress] with meticulous care and specificity."); *United States v. Giordano*, 416 U.S. 505, 515, 94 S. Ct. 1820, 1826-27 (1974); *Gelbard v. United States*, 408 U.S. 41, 48 n.6, 92 S. Ct. 2357, 2361 n.6 (1972); *Lam Lek Chong v. United States Drug Enforcement Administration*, 929 F.2d 729, 732 (D.C. Cir. 1991); *United States v. Marion*, 535 F.2d 697, 700-01 (2d Cir. 1976); *United States v. Jones*, 542 F.2d 661, 668 (6th Cir. 1976); *United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975). Congress's main purpose in enacting Title III was to combat organized crime and other types of offense which tend to evade detection by conventional investigative techniques--not every garden variety, run-of-the-mill state law crime. *Id.* New Hampshire's wiretapping statute is directly at odds with Title III's fundamental congressional scheme. In contrast to the limited roster of offenses for which Congress authorized the States to engage in wiretapping, the New Hampshire wiretapping act is an unbridled mandate to that State's law enforcement officials to engage in wiretapping virtually whenever and wherever they want to.

Worse, the New Hampshire Supreme Court has held that, contrary to the procedure required under the federal statute, in New Hampshire the State's law enforcement officials do not even have to notify the person against whom they have conducted electronic surveillance of the fact that they have done so, and the intercept is not rendered unlawful by such omission. *State v. Rowman*, 116 N.H. 41, 46-47, 352 A.2d 737, 740-41 (1976). The New Hampshire court reasoned that the post-surveillance notification requirement, though part of the federal wiretapping statute (18 U.S.C. § 2518(8) (d)) and "a useful device for implementing the fourth amendment prohibition of unreasonable searches and seizures," 116 N.H. at 46, 352 A.2d at 741, was merely a statutory requirement, not a constitutional one. In New Hampshire, therefore, not

only do the police have the power to invade the privacy of that State's residents virtually at will, but the target of the wiretap or other electronic surveillance may never even know that his privacy has been invaded.

In this respect, the New Hampshire court's holding in *Rowman* was surely wrong. The legislative history of Title III makes plain that the post-surveillance notification requirement was a central feature of that statute. The requirement was intended by Congress as a check on the potential abuse of power by law enforcement officials: Title III contemplates that if the target of electronic surveillance, upon being notified that his telephone has been tapped or that he has otherwise been the subject of electronic eavesdropping, decides that that wiretap or eavesdropping was conducted unlawfully, he may sue the offenders for civil damages:

> Yet the intent of the provision is that the principle of post use notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress for example, under section 2520, discussed below, if he feels that his privacy has been unlawfully invaded.

S. Rep. No. 1097 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, p. 2194. Obviously, this remedy is of little use to him, and there is little curb on the abuse of power, if he never learns of the fact that the electronic surveillance has been performed in the first place.

For these reasons, this case is far more important than the relatively mundane issue of whether one lone state prisoner should have his rape conviction vacated because his rights were violated. Because of the statute's overbreadth and

because of the New Hampshire Supreme Court's holding that the post-surveillance notification requirement of 18 U.S.C. § 2518(8) (d) is not required of state law enforcement officials, *State v. Rowman*, 116 N.H. 41, 352 A.2d 737 (1976), the New Hampshire wiretapping statute is a threat to the rights and privacy of every person who uses a telephone within the borders of the State of New Hampshire. That statute is virtually an open license for New Hampshire state law enforcement officials to engage in wiretapping wherever and whenever they choose, and it is an invitation to abuse of the type condemned by this Court in its landmark decisions in *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873 (1967), and *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), and condemned by Congress when it passed Title III in the first place. Given the manner in which the New Hampshire Supreme Court disposed of this case, and given the fact that under its holding *Rowman* the residents of New Hampshire will seldom become aware that their telephones are tapped by the State whenever that occurs, this Court will rarely have a better opportunity to review that statute and to curb a state legislature's abuse of its authority.

B. The Issue of Whether Wiretapping May Be Used by the States in Conjunction With Nonviolent Sex Crime Is an Open Issue Upon Which Prominent Courts Have Disagreed, and Which Invites Review by This Court.

Additionally, the subsidiary issue of whether Title III permits a State to utilize wiretapping in connection with the investigation of a concededly nonviolent sex crime is important in its own right, and it presents an appealworthy issue for this Court's review. On the specific issue of whether electronic eavesdropping may lawfully be used by a State in conjunction with the investigation of an alleged sex crime in which it is conceded that no force, violent, or threat

thereof was used, four state courts of last resort and one federal district court have reached opposite conclusions. *Contrast State v. Kepple*, -- N.H. --, 866 A.2d 959 (2005), *and Commonwealth v. Birdseye*, 543 Pa. 251, 670 A.2d 1124 (1996), *with State v. Rivers*, 660 So. 2d 1360 (Fla. 1995), *cert. denied*, 516 U.S. 1147 (1996); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980); *and United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988). This Court has never spoken on that issue.

The legislative history of Title III tends to indicate that Congress simply did not intend wiretapping and electronic eavesdropping to be used by the States in connection with nonviolent sex crimes. Significantly, rape is not among the crimes enumerated by Congress in 18 U.S.C. § 2516(2) as offenses for which the States are authorized to conduct wiretapping, despite the fact that it must surely occurred to Congress to include as obvious a crime as that one. The congressmen and senators who enacted Title III were intelligent, sophisticated men and women, and if they had wanted to include rape or any other sex offense on the roster of crimes as to which the States were to be permitted to conduct wiretapping, they were surely capable of doing so. Consistent with the established tenet that Congress intended wiretapping to be reserved for only the most serious crimes, S. Rep. No. 1097 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, pp. 2153, 2177, 2186-87; *United States v. United States District Court*, 407 U.S. 297, 304, 92 S. Ct. 2125, 2130 (1972), Mr. Kepple properly argued to the New Hampshire Supreme Court that if forcible rape itself is not on the list of crimes as to which Congress authorized the States to conduct wiretapping, then Congress surely cannot have intended that wiretapping was to be used by the States in connection with a wholly nonviolent sex crime.

In making this argument, Mr. Kepple was in good company. His position is shared by at least one United States district court and by the highest courts of two States. *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988); *State v. Rivers*, 660 So. 2d 1360 (Fla. 1995), *cert. denied*, 516 U.S. 1147 (1996); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980). The common sense of the matter was succinctly stated in *Millstone Enterprises*, wherein the court said:

> We cannot agree that by including prostitution among its listing of "racketeering activities" the Pennsylvania legislature can thereby transform prostitution into a crime dangerous to life or limb. While prostitution might be conduct which often may lead to violence, it is not in and of itself dangerous to life or limb. * * *
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> * * * [T]he federal statute's grant of enabling power to the states in section 2516 makes it clear that Congress did not intend to supercede state regulation of these matters entirely. The statute recognizes that a state is free to either adopt procedures and standards more restrictive than those of the federal statute or, if it desires, to prohibit wiretapping within its borders altogether. 18 U.S.C. § 2516(2). However, any state law drawn more broadly than the federal statute runs afoul of the supremacy clause. * * * State statutes may narrow the scope of permissable [*sic*] state wiretapping, but may not permit state and local authorities to intercept wire and oral communications forbidden by the federal statute.

684 F. Supp. at 871.

The issue of whether the federal wiretapping statute permits the States to engage in wiretapping in conjunction with a wholly nonviolent sex crime is an important one on which different courts have reached divergent conclusions, and it remains unresolved. Upon being squarely confronted with this issue on appeal, the New Hampshire Supreme Court chose to skirt it, deciding the case on different grounds. As of this moment, the police in New Hampshire can still conduct wiretapping in conjunction with wholly nonviolent sex crimes, even where it is undisputed that no force, violence, or threats were used. This case presents an ideal opportunity for this Court to resolve the conflict in the reported cases and to say whether Title III permits a State's law enforcement authorities to do so.

C. The Mandatory Procedure Relating to "Other Crimes" Wiretap Evidence Needs to Be Enforced Against the States.

This case also shows that there is a necessity for this Court to remind the States that Title III's procedural requirements concerning "other crimes" evidence are not mere statutory window dressing and that the States must strictly comply with them. The crimes of criminal solicitation and endangering the welfare of a child, which are the "other crimes" at issue in this case, are not among the crimes enumerated in 18 U.S.C. § 2516(2) as crimes for which the States may authorize their law enforcement personnel to utilize wiretapping. Nor are they crimes for which the New Hampshire wiretapping statute itself authorizes such utilization. Nor were they even listed in the New Hampshire Attorney General's memorandum of authorization in the instant case. In this case it is undisputed that the State never applied to any judicial officer for permission to use the fruits of the intercept to support prosecutions for the crimes of criminal solicitation and child endangerment before

introducing its contents to the jury at trial, contrary to the requirements of both 18 U.S.C. § 2517(5) and its New Hampshire counterpart, N.H. Rev. Stat. Ann. § 570-A:8, and it is well-nigh undisputed that the State also disclosed the contents of that intercept to the grand jury to help procure the indictments on all four charges, similarly without seeking or obtaining permission beforehand. (App. C.) These disclosures, and the failure of the State of obtain judicial permission before effecting them, amounted to a cut-and-dried violation of 18 U.S.C. § 2517(5), requiring suppression of the evidence and dismissal of the indictments. *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975); *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976); *United States v. Ward*, 808 F. Supp. 803 (S.D. Ga. 1992); *United States v. Mancari*, 663 F. Supp. 1343, 1350-54 (N.D. Ill. 1987). In the past, the courts have strictly applied the federal wiretapping statute's procedural requirements for the use of "other crimes" evidence, recognizing that the gathering and use of wiretap evidence in conjunction with crimes not enumerated in section 2516 constitutes a significant and important departure from the fundamental congressional scheme of Title III and requires special regulation. *Id.*

On appeal in this case, the New Hampshire Supreme Court simply ignored this defect and summarily opined that "the interception here did not gather any evidence of either criminal solicitation or endangering the welfare of a child," finding that the statements made by Mr. Kepple during the taped telephone conversation related only to the aggravated felonious sexual assault charges. (App. 6a-7a.) This finding is an astonishing construction of the record in this case, and to allow it to stand would be to allow New Hampshire and other States to openly flout the mandatory statutory procedural requirements of 18 U.S.C. § 2517(5).

A transcript of the tape-recorded telephone conversation shows that the statements made by the petitioner--and, for the most part, by the victim herself--were nonspecific: they do not describe any particular acts. When, for example, Mr. Kepple says during the conversation, "I'm trying to rationalize why I did something like this . . . to you" (App. 65a), there is no indication of what "this" refers to. Indeed, but for a fleeting remark or two uttered in passing by the victim during the entire, roughly 10-minute telephone conversation, one would have no idea from a reading of the transcript what the parties are even talking about, or what Mr. Kepple is claimed to have done to the victim. In the indictment for *endangering the welfare of a child*, the State alleges that "Francis Kepple provided an intoxicating alcoholic beverage to J.P., which J.P. consumed causing J.P.'s intoxication, [¶ 5] the said Francis Kepple then performing cunnilingus upon J.P., an act of sexual penetration as defined within RSA 632-A:1, v." (App. C.) The contents of the intercept were equally as applicable to that indictment as to any of the other three. They related to the *entire transaction*, not merely to any specific charge. (App. 62a-70a.)

Interestingly, the New Hampshire Supreme Court's finding that "these statements related [only] to the aggravated felonious assault charge" (App. 6a) is in direct conflict with the finding of its own trial court. In ruling on Mr. Kepple's motion to suppress, the motion judge observed: "A review of the transcript of the intercepted telephone conversation makes it clear that neither party to the conversation ever discussed the specific acts that are the subject of the two indictments in question." (App. 14a.) The Supreme Court's finding is even in direct conflict with the representations made to the trial court by the State's own prosecutor during the hearing on Mr. Kepple's motion to suppress:

> MR. WATKINS: * * * [Defense] [c]ounsel says, well, you know, then they went ahead and based on this one party [*viz.*, the one-party intercept], they went ahead and charged him with endangering the welfare of a child, criminal solicitation. It's not the one party that was the basis for those charges. It was the investigation of this matter which, included the one party, that was the basis of those charges. *In fact, there was never a discussion of any specific acts that occurred during the assault during the one party.*

(Transcript of Hearing on Motion to Suppress at 10-11 (emphasis added).)

The prosecutor and the motion judge were absolutely right. Mr. Kepple made no admissions as to any specific act, and everything he said in the conversation was equally applicable to all four charges. At trial and before the grand jury, the wiretap was used to corroborate the fact that the entire transaction occurred, not merely to prove the commission of any specific act. It was not until later, on appeal, that the State changed its story and claimed that the contents of the conversation were specific to the crime of aggravated felonious sexual assault and that the conversation related only to that charge.

This Court should not allow the State to emasculate one of Title III's essential safeguards by gerrymandering the record in this fashion, and it should not allow the New Hampshire Supreme Court to marry itself to such legerdemain merely for the sake of rescuing a defective criminal conviction and reaching what the court perceives--perhaps understandably--to be a just result. If the New Hampshire court's decision in this case gains currency, prosecutors throughout the nation will almost always be able to evade the requirements of Title III--any time, any place--merely by mouthing the easy incantation

that the wiretap evidence was offered only in support of specific crimes, but not others, and the procedural commands of 18 U.S.C. § 2517(5) will be eviscerated. The New Hampshire Supreme Court's finding that the statements made in the secretly recorded telephone conversation related only to the aggravated felonious sexual assault charges is sheer folly. Intervention by this Court is needed in order to impress upon the States, their courts, and their law enforcement officials the same sense of seriousness concerning wiretapping with which Congress itself approached that subject when it enacted Title III.

D. An Important Issue Exists as to Whether 18 U.S.C. § 2511(2) (c) Should Be Permitted to Trump the Rule that State Wiretapping Statutes Must Adhere to Minimum Federal Procedural Requirements.

The ultimate basis upon which the New Hampshire Supreme Court affirmed Mr. Kepple's convictions was that inasmuch as it was legal as a matter of *federal* law for the police to have secretly tape-recorded his telephone conversation with the victim, none of his federal rights was violated, and therefore no conflict existed between the New Hampshire state wiretapping statute and federal law in this case. (App. 5a-6a.) The New Hampshire court's decision flies directly in the face of the legislative history of Title III and in the face of that which was heretofore thought to be a settled tenet of the law of wiretapping and electronic surveillance. Numerous decisions, both federal and state, have held that whenever a State chooses to enact a wiretapping statute that is more restrictive than the federal wiretapping statute--which, in many respects, the New Hampshire wiretapping statute is--the State and its law enforcement personnel must adhere to the minimum procedural requirements of *both* the federal wiretapping statute *and* the State's own wiretapping statute. *United States*

v. McNulty, 729 F.2d 1243, 1264 (10th Cir. 1984) (en banc); *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976); *United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988); *United States v. Geller*, 560 F. Supp. 1309, 1314-15 (E.D. Pa. 1983), *aff'd sub nom. United States v. DeMaise*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *State v. Rivers*, 660 So. 2d 1360, 1362 (Fla. 1995), *cert. denied*, 516 U.S. 1147 (1996); *Commonwealth v. Vitello*, 367 Mass. 224, 249-50, 327 N.E.2d 819, 832-35 (1975); *State v. Catania*, 85 N.J. 418, 427 A.2d 537, 547 (1981); *People v. Shapiro*, 50 N.Y.2d 747, 762-64, 431 N.Y.S.2d 422, 431-32, 409 N.E.2d 897, 906-07 (1980); *Saldana v. State*, 846 P.2d 604, 612 (Wyo. 1993). A state legislature is not permitted to "cherry pick" those parts of the federal statutory scheme which it deems desirable and to disregard the restrictions imposed upon the States by that scheme. *Id.* The plan of Title III, as explained by that statute's drafters themselves, was to offer the States a choice: a State may draft wiretapping legislation which is more restrictive to its law enforcement officials than the federal statute; it may ban wiretapping within its borders entirely; or it may pass no wiretapping statute at all. However, it may not enact any legislation which is *less* restrictive, and if it chooses to enact its own wiretapping statute it must comply with all of the minimum procedural safeguards of both the federal wiretapping statute and its own statute. *Id.*

> No [State wiretap] applications may be authorized unless a specific State statute permits it. The State statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed

> provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.

S. Rep. No. 1097 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, p. 2187.

There is little reason to think that Congress intended to displace the fundamental balance which Title III had struck between federal and state wiretapping authority by substituting 18 U.S.C. § 2511(2) (c), which provides that as a matter of *federal* law it is not unlawful to secretly record conversations to which one is a party. If a State enacts a wiretapping statute more restrictive than Title III, then under the weight of the foregoing authorities it must comply with all of the minimum requirements and restrictions of both Title III *and* the state statute which it has passed.

The New Hampshire wiretapping statute is indeed generally more restrictive than Title III. Whereas under federal law the private citizen is free to secretly record any telephone conversation to which he is actually a party, the New Hampshire statute imposes nearly a complete ban on all wiretapping and electronic eavesdropping within that State's borders. N.H. Rev. Stat. Ann. § 570-A:2. Essentially, the only exceptions to that ban are for employees of emergency rescue service companies, employees of the telephone company and other public utilities, and law enforcement authorities gathering evidence of specified crimes and under specified circumstances, with the approval of the state Attorney General's office. *Id.* The private citizen cannot lawfully engage in *any* secret tape-recording of telephone conversations or other wiretapping without the involvement of the police and the approval of the New Hampshire Attorney General. *Id.*

By enacting a more restrictive wiretapping statute and taking away what would otherwise be the ordinary citizen's right under federal law to secretly tape-record telephone conversations to which he is a party, and by giving that right almost exclusively to law enforcement officials, the State of New Hampshire has injected itself into virtually all wiretapping and electronic eavesdropping which takes place within that State. New Hampshire has ensured that state action is present in virtually all lawful clandestine recording. In so doing, New Hampshire has accepted the contract which Congress offered the States and has thereby bound itself to observe all of the restrictions imposed on the States by the federal statute. It is illogical that the State, having enacted a wiretapping statute which generally precludes the private citizen from engaging in any secret tape-recording of telephone conversations and permits the police to do so only under very tightly-controlled, highly-restrictive conditions, should now be allowed to proceed as if there were no state wiretapping statute at all.

The lone federal authorities which the New Hampshire Supreme Court cited in support of its decision, *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990), and *Whitaker v. Garcetti*, 291 F. Supp. 2d 1132, 1142 (C.D. Cal. 2003), have no application to the issue presented herein and do not support the New Hampshire court's holding. *Whitaker* is not at all on point and it presents entirely different issues, and the New Hampshire Supreme Court cited it solely for the premise that "Congress' wiretapping statute was not an attempt to occupy the field, but merely an attempt to establish minimum standards" (App. 5a)--a proposition with which the petitioner does not disagree. In *Griggs-Ryan*, a civil case, the plaintiff chose to file suit solely on the basis that his rights under the *federal* wiretapping statute had been violated. No issue was presented as to the admissibility of an unlawful wiretap in a

state criminal proceeding. Further, in that case a live issue existed as to whether the plaintiff had actually or impliedly consented to the recording, a circumstance which limits its usefulness as authority here.

In any event, to the extent that the New Hampshire Supreme Court's interpretation of this case is correct, it is in direct conflict with the many court of appeals decisions, *op. cit.*, holding that a State which chooses to enact its own wiretapping statute must observe the minimum procedural protections of both the federal wiretapping statute and its own statute, furnishing that much more reason why this Court should review the New Hampshire court's decision and resolve the conflict. This Court should do so in any event. If the New Hampshire Supreme Court's decision in this case is allowed to stand, it will furnish a built-in "escape hatch" whereby state law enforcement officials will be able to altogether evade the procedural requirements and protections of Title III which were intended by Congress to foster the goal of protecting individual privacy.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the decision of the New Hampshire Supreme Court dated January 24, 2005.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2003-432

THE STATE OF NEW HAMPSHIRE

v.

FRANCIS KEPPLE

Argued: November 9, 2004
Opinion Issued: January 24, 2005

Before DUGGAN, NADEAU, DALIANIS, and GALWAY, JJ.

OPINION

DUGGAN, J. Following a jury trial, the defendant, Francis Kepple, was convicted of two counts of aggravated felonious sexual assault, RSA 632-A:2, I(i), (j) (1996) (amended 2003), one count of criminal solicitation, RSA 629:2 (Supp. 2004), and one count of endangering the welfare of a child, RSA 639:3 (1996) (amended 2002, 2003). On appeal, he argues that the Superior Court (Hollman, J.)

erroneously denied his motion to suppress a tape recording of a conversation between him and the victim. We affirm.

The jury could have found the following facts. In July 2001, the defendant invited the fifteen-year-old victim to earn some money by helping him clean a house in Raymond where he was doing maintenance work. Shortly after they arrived at the house, the defendant supplied the victim with vodka and Pepsi. After drinking some of the vodka and eating a sandwich, the victim began to feel "really sick." The defendant suggested that she should lie down on a bed. When she did so, he sat down next to her and started rubbing her stomach. The defendant then removed the victim's clothing and performed oral sex on her. Afterward, the defendant began masturbating and asked the victim if she wanted to perform oral sex on him. At that point, the victim "realized what was going on," put on her clothes and left.

Eventually, the victim disclosed these events to the Raymond police. The victim and her parents consented to, and the attorney general's office authorized, the recording of a conversation between the victim and the defendant as a one-party intercept under RSA 570-A:2, II(d) (2001) to investigate the crime of aggravated felonious sexual assault. During the conversation, the defendant made statements acknowledging his responsibility for the assault.

Prior to trial, the defendant moved to suppress the tape recording of his conversation with the victim, arguing that the New Hampshire Wiretapping and Eavesdropping statute, RSA ch. 570-A (2001 & Supp. 2004), is unconstitutional on its face and as applied to the facts of this case because it purports to authorize electronic surveillance for offenses that are not specifically enumerated in the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act

of 1968 (Title III). *See* 18 U.S.C. § 2516(2) (2000). Additionally, the defendant argued that the State failed to obtain judicial authorization under RSA 570-A:8 to use the recording to support the charges brought subsequent to the intercept that were not enumerated in the one-party intercept memorandum.

The trial court found that the offenses enumerated in RSA chapter 570-A fell within the general category of "other crimes dangerous to life, limb, or property" authorized in Title III and thus the State statute is not unconstitutional on its face. Furthermore, the trial court found that the alleged sexual assault in this case involved danger to the victim's life and thus the intercept was authorized under Title III. Finally, the trial court found that the State did not violate RSA 570-A:8 because the evidence to support the criminal solicitation and endangering the welfare of a child indictments came from sources other than the one-party intercept. The tape recording was played for the jury and admitted as evidence at trial.

The defendant raises three issues on appeal. First, he argues that the State wiretapping statute, RSA chapter 570-A, violates the Supremacy Clause of the Federal Constitution because it authorizes electronic surveillance for offenses that are not specifically enumerated in Title III. *See* 18 U.S.C. § 2516(2). Second, he argues that the one-party intercept in this case was unlawful under Title III because the alleged aggravated felonious sexual assault charge did not involve any danger to the victim's life, limb or property. *See id.* Third, he argues that the trial court should have suppressed the tape recording because the State gathered evidence for offenses not designated by the authorization and failed to apply for judicial approval to use the recording during the trial as is required under RSA 570-A:8.

The State argues that because Title III specifically excludes electronic surveillance when one party consents to the recording, the federal limitations regarding enumerated offenses are inapplicable here. *See* 18 U.S.C. § 2511(2)(c) (2000). The State further contends that post-interception approval to use the recording was not required because the information obtained was limited to the aggravated felonious sexual assault offense enumerated in the authorization. We agree with the State.

First, the defendant argues that the State statute violates the Supremacy Clause of the Federal Constitution because it authorizes wiretapping in circumstances that are not permitted under federal law. Under the Supremacy Clause, state law is preempted when: "(1) Congress expresses an intent to displace state law; (2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or (3) state and federal law actually conflict." *Koor Communication v. City of Lebanon*, 148 N.H. 618, 620, 813 A.2d 418 (2002) (quotation omitted). The defendant contends that the State statute conflicts with federal law because it authorizes wiretapping to investigate crimes that are not enumerated in the federal statute. *Compare* 18 U.S.C. § 2516(2) *with* RSA 570-A:7. Because the constitutionality of a statute involves a question of law, we review the trial court's determination *de novo*. *State v. Bortner*, 150 N.H. 504, 510, 841 A.2d 80 (2004).

Title III permits interception of wire, oral or electronic communications by law enforcement officers when it may provide evidence of certain enumerated offenses or other crimes "dangerous to life, limb, or property" and punishable by imprisonment for more than one year. 18 U.S.C. § 2516(2). The federal statutory scheme provides an exception, however, for one-party intercepts:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c). Thus, communications in which one party consents to have the conversation recorded are not protected from interception under Title III. *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990).

"It is well accepted that Congress' wiretapping statute was not an attempt to occupy the field, but merely an attempt to establish minimum standards." *Whitaker v. Garcetti*, 291 F. Supp. 2d 1132, 1142 (C.D. Cal. 2003). We have recognized that RSA chapter 570-A is more stringent than its federal counterpart, providing more protection for the individual's right to privacy. *State v. Ayres*, 118 N.H. 90, 91, 383 A.2d 87 (1978) (superseded by statute on other grounds). Under RSA 570-A:2, a law enforcement officer may intercept oral communications when one of the parties has given prior consent to the interception, provided that the attorney general's office determines that there is reasonable suspicion that evidence of criminal conduct will be derived from the interception. RSA 570-A:2, II(d); *see, e.g., State v. Conant*, 139 N.H. 728, 729-30, 662 A.2d 283 (1995). Thus, the State statute does not conflict with federal law, but rather provides greater protection of individual rights because it requires authorization from the attorney general prior to conducting the one-party intercept.

Next, the defendant argues that the intercept violated federal law because aggravated felonious sexual assault is not one of the enumerated offenses under Title III and, in this

case, did not involve danger to the victim's life, limb or property. *See* 18 U.S.C. § 2516(2). This argument assumes the applicability of Title III to one-party consent interceptions. Because Title III explicitly exempts one-party interceptions from the statutory scheme, we hold that the federal law does not apply to the interception in this case. *See* 18 U.S.C. § 2511(2)(c). When the State seeks to introduce evidence obtained by a one-party consent interception, our statutory inquiry is limited to whether there has been compliance with RSA chapter 570-A.

Finally, the defendant argues that the State failed to comply with statutory procedure for using and disclosing the contents of the one-party intercept. *See* RSA 570-A:8, V. The police sought and obtained the authorization for the one-party intercept from the attorney general's office to investigate the charge of aggravated felonious sexual assault. *See* RSA 570-A:7. The defendant argues that the State also used the contents of the intercept to indict and convict the defendant on the other offenses charged; namely, criminal solicitation and endangering the welfare of a child. Under RSA 570-A:8, when the police intercept communications relating to offenses other than those specified in the order of authorization, the police must submit a subsequent application to a judge for approval before disclosing the contents of the communication at trial. RSA 570-A:8, V.

Even assuming that the authorization requirement under RSA 570-A:8 applies to one-party intercepts, the interception here did not gather any evidence of either criminal solicitation or endangering the welfare of a child. During the taped conversation, the defendant acknowledged that he was attracted to the victim and took advantage of her. These statements related to the aggravated felonious sexual assault charge, for which the interception was authorized. There were

no references during the conversation to the victim's consumption of alcohol or the defendant's solicitation of oral sex, which were the bases for the other indictments. We thus reject the defendant's argument that the authorization violated RSA 570-A:8, V.

Accordingly, we hold that the trial court did not err in denying the defendant's motion to suppress the tape recording.

Affirmed.

NADEAU, DALIANIS and GALWAY, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Francis Kepple

02-S-552 -- 556

[Filed April 10, 2003]

ORDER

The defendant, Francis Kepple, is charged with two counts of aggravated felonious sexual assault, *see* RSA 632-A:2 (Supp. 2002), one count of endangering the welfare of a child, *see* RSA 639:3 (Supp. 2002), one count of criminal solicitation, *see* RSA 629:2 (Supp. 2002), and one count of violation of privacy, *see* RSA 644:9 (1996). This order addresses the following motions: (1) defendant's motion to suppress the tape recording of, and any other evidence derived from, his intercepted conversation with the alleged victim, J.P. (Doc. 17); (2) defendant's motion to suppress all evidence obtained as a result of the search warrant issued and executed on December 14, 2001 (Doc. 18); (3) defendant's motion to conduct an oral deposition of J.P. (Doc. 19);

(4) defendant's motion for production of Seacoast Child Advocacy Records and related discovery (Doc. 20); (5) defendant's motion to order State to disclose witness identities and locations (Doc. 21); (6) defendant's motion to introduce evidence of J.P.'s prior sexual activity (Doc. 22); (7) defendant's motion to sever (Doc. 23); and, (8) defendant's motion for production of videotaped interview of J.P. (Doc. 31). The State objects. The Court held a hearing on defendant's motions on March 28, 2003 and now finds and rules as follows.

Defendant is the step-grandfather of J.P. The instant charges, except the one count for violation of privacy, arise out of an alleged sexual assault that occurred when defendant asked J.P., his fifteen-year-old step-granddaughter, to accompany him on a house-cleaning job in Raymond, New Hampshire in the summer of 2001.

Defendant's first motion seeks to suppress a one-party intercept between J.P. and defendant. On or about December 12, 2001, the Raymond Police Department staged a wiretap to record a telephone conversation between J.P. and defendant in an effort to obtain evidence of defendant's alleged sexual assault of J.P. The State complied with all requirements under RSA 570-A:2, II (d), including obtaining J.P.'s consent to the interception.

Defendant now moves to exclude this taped conversation and any evidence derived from it, arguing that RSA 570-A is unconstitutional on its face and as applied to the facts of this case. Additionally, defendant contends the intercept's authorization and execution violated the procedural requirements of RSA 570-A.

Title III of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2530, authorizes an interception only

> when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, *or other crimes dangerous to life, limb, or property*, and punishable by imprisonment of more than one year . . . .

18 U.S.C. § 2516(2) (emphasis added). Even a cursory examination of New Hampshire's wiretap statute, RSA Chapter 570-A, reveals that it enumerates a more expansive list of offenses where interceptions are permitted than its federal counterpart. Under RSA 570-A:7, the attorney general is authorized to approve one-party intercepts in connection with the investigation of numerous offenses, including child pornography, computer pornography and child exploitation, criminal conduct in violation of the securities laws, aggravated felonious sexual assault, and felonious sexual assault. (2001).

Because none of these offenses are specifically enumerated in the federal statute, defendant contends that RSA 570-A:7 is unconstitutionally overbroad. However, the court finds this argument to be utterly devoid of merit. Indeed, such offenses fall within the "other crime dangerous to life, limb, or property" general category of the federal statute and therefore need not be specifically enumerated. The crime of aggravated felonious sexual assault, in particular, is an inherently dangerous offense to life and limb.

Even if it is not unconstitutional on its face, defendant maintains that RSA 570-A:7 is unconstitutional as applied to the facts of this case. According to defendant, the alleged assault of J.P. was not dangerous to life or limb because it involved no force or violence by defendant. Defendant therefore contends that the State lacked the statutory power to authorize the intercept.

While there is no indication that the alleged sexual assault involved danger to limb or property, the court finds it did involve danger to life. Indeed, the facts and circumstances of this case could have reasonably led police to suspect that defendant's alleged assault involved a measure of coercion or force. Defendant allegedly took J.P. to a vacant home where he furnished her with a bottle of vodka, all the time being fully aware of her drinking problem. When J.P. became ill after consuming half the bottle, she went to lie down on a bed. While J.P. was lying down, defendant allegedly partially disrobed her and performed oral sex on her. Defendant then allegedly exposed himself to J.P. and solicited her to perform fellatio on him. It was only after J.P. got up that she grabbed her clothes and left. Clearly, the providing of alcohol to a fifteen-year-old child to the point of intoxication and possible incapacitation is a measure of coercion if not force.

To the extent that defendant argues that the alleged sexual assault is not a danger to life, the court strongly disagrees. It is well known that several life-threatening diseases, such as AIDS, may be transmitted through sexual contact. In addition, the psychological and emotional trauma usually resulting from this type of sexual assault can lead to suicidal ideation. In sum, the court finds and rules that RSA 570-A is not overbroad on its face or as applied to this case.

Defendant next argues that the State violated the procedural requirements of RSA 570-A when it obtained the authorization for and executed the one-party intercept. Specifically, defendant contends that the State failed to provide evidence of Senior Assistant Attorney General Anne Rice's authority to grant one-party intercepts, failed to note the statutory provisions for the crimes under investigation, and failed to apply to the Court for approval to use the wiretap evidence to indict defendant for offenses not listed in the state wiretap statute, RSA 570-A.

At hearing, the State provided the Court and defendant's counsel with the affidavit of Attorney Rice. Because this affidavit clearly indicates that the Attorney General had authorized Attorney Rice to approve one-party intercepts at the time she approved the intercept in question, defendant has withdrawn the lack of authority ground.

Nevertheless, defendant maintains that the State violated the procedural requirements of RSA 570-A by failing to note the corresponding statutory provision for the offense listed in the memorandum authorizing the one-party intercept. However, the first page of the memorandum of approval for the one-party intercept clearly states: "CRIMES UNDER INVESTIGATION: Aggravated Felonious Sexual Assault." Consistent with statutory requirements, the memorandum describes the crime that law enforcement officers were authorized to investigate through the intercept. *See* RSA 570-A:2, II (d) (Supp. 2002). The fact that the memorandum does not also list this offense's corresponding statutory provision is of no consequence. The court cannot find, and defendant has not directed the court's attention to, any provision in RSA Chapter 570-A that supports defendant's position.

Finally, defendant argues that the State failed to obtain judicial authorization under RSA 570-A:8 for the charges brought subsequent to the intercept that were not specifically enumerated in the one-party intercept memorandum, namely endangering the welfare of a child and criminal solicitation. Under RSA 570-A:9,

> III. Any person who has received, by any means authorized by this chapter, any information concerning a telecommunication or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.
>
> . . . .
>
> V. When a law enforcement officer, while engaged in intercepting telecommunications or oral communications in the manner authorized herein, intercepts telecommunications or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, . . . may be used under paragraph III, when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter.

(2001). At hearing, the State represented that the one-party intercept was not the basis for the endangering the welfare of

a child and criminal solicitation indictments. A review of the transcript of the intercepted telephone conversation makes it clear that neither party to the conversation ever discussed the specific acts that are the subject of the two indictments in question. Rather, it appears that J.P.'s statement and her interview at Seacoast Child Advocacy Center formed the basis for these two indictments. Because the information supporting these two indictments came from sources other than the intercept, the court finds and rules that the State did not violate RSA 570-A:8.

For the reasons stated above, the court finds and rules that the approval and execution of the one-party intercept was lawful. Defendant's motion to suppress the one-party intercept is accordingly **DENIED**.

Defendant's second motion seeks suppression of all evidence seized as a result of a search warrant issued for his residence. On December 14, 2001, the Exeter District Court (Reardon, J.) issued a search warrant authorizing law enforcement officers to seize the following items from defendant's residence: photographs and photo albums of J.P., digital cameras, computers, and computer discs.

Defendant first argues that the warrant was obtained as a result of an unlawful intercept. However, this argument is now unavailing, given the court's ruling that the one-party intercept was lawful.

Defendant next argues that the search warrant was overbroad. According to defendant, the Raymond Police Department's affidavit in support of its application for a search warrant only listed photographs of J.P. and a photo album of J.P. as the items the police wanted to seize. Defendant therefore asserts the search warrant was patently

overbroad due to the inclusion of items other than those enumerated in the application.

Contrary to defendant's assertions, the application and the supporting affidavit clearly provide that the Raymond Police Department was looking for photographs of J.P., a photo album of J.P., digital cameras that could contain photographs of J.P., computers or computer discs that could contain downloaded photographs of J.P., and any other material depicting the likeness of J.P. Furthermore, because the police believed that defendant had taken photographs of J.P. with a digital camera, it was necessary and reasonable for the police to expand their search request so as include items that could store the digital photographs. The court therefore concludes that the search warrant was not overbroad.

Defendant further contends that the State should be barred from introducing any pornographic images found on his seized computer as these images are irrelevant and highly prejudicial. However, this is no longer an issue given the State's representations at hearing. The State represented that it will not be offering this pornographic material at trial. The State also represented at hearing that it only planned to introduce one photograph of J.P. at trial to establish her presence at the location of the alleged incident. For the foregoing reasons, defendant's motion to suppress evidence obtained as a result of the December 14, 2001 search warrant is **DENIED**.

Through his third motion, defendant seeks to conduct an oral deposition of J.P. Under RSA 517:13,

> II. The court in its discretion may permit either party to take the deposition of any witness, except the defendant, in any criminal case, upon a finding by a

preponderance of the evidence that such deposition is necessary:

(a) To preserve the testimony of any witness who is unlikely to be available for trial due to illness, absence from the jurisdiction or reluctance to cooperate; or
(b) To ensure a fair trial, avoid surprise or for other good cause shown. In determining the necessity, the court shall consider the complexity of the issues involved, other opportunities or information available to discover the information sought by the deposition, and any other special or exceptional circumstances which may exist.

. . . .

V. Notwithstanding this section, no party in a criminal case shall take the discovery deposition of a victim who was 16 years of age or under at the time of the alleged offense or of any witness who was 16 years of age or under at the time of the alleged offense.

(1997).

According to the State, J.P. was under sixteen years of age at the time of the alleged offense and therefore defendant's request is barred by the unequivocal language of RSA 517:13, V. However, the court notes that while J.P. was under the age of sixteen at the time of the alleged offense, she is now over age sixteen.

The New Hampshire Supreme Court has recognized that in enacting RSA 517:13, V, "the legislature could reasonably have found that repetitive subjection to interrogation without

judicial supervision is so disturbing to young victims and witnesses as to threaten effective prosecution of the cases in question." *State v. LaPorte*, 134 N.H. 73, 77 (1991) (quotation and citation omitted). In *LaPorte*, the Supreme Court held, however, that there is "no rational relationship between denying [the defendant] the opportunity to depose a victim now over age sixteen and the stated goal of protecting children from 'repetitive subjection to interrogation without judicial supervision.'" *Id.* (citation omitted). Notably, the statute does not bar depositions of victims who are sixteen at the time of the deposition. Rather, the statute bars depositions of victims who are sixteen at the time of the offense. To that end, the *LaPorte* Court construed RSA 517:13 "to bar depositions only of those victims and witnesses who, at the time of the discovery deposition, are under sixteen years of age." *Id.* at 78. Therefore, contrary to the State's assertions, defendant's request is not barred by RSA 517:13, V.

Nevertheless, the defendant must still make some showing of necessity for the court to grant a motion to depose pursuant to RSA 517:13, II. "This showing must be made with reference to the facts and circumstances of the particular case." *State v. Rhoades*, 139 N.H. 432, 434 (1995). Because defendant is not asserting that J.P. will be unavailable for trial, RSA 517:13, II (a) is inapplicable. Defendant does, however, offer the following reasons why it is necessary to depose J.P.: (1) to explore his theories and other possible motives for why J.P. is falsely accusing him; (2) to uncover additional evidence to refute J.P.'s testimony; (3) to obtain a more expansive account of the alleged offense; (4) to obtain names and contact information concerning several potential witnesses; and, (5) to observe J.P.'s demeanor.

"Discovery depositions are not always essential to adequate trial preparation, for there may be other sources of

information and evidence available to an accused." *Rhoades*, 139 N.H. at 434 (quotation and citation omitted). Under the facts and circumstances of this case, the court finds that defendant did not show by a preponderance of the evidence that it is necessary to depose J.P. First, this case does not involve complex facts or subject matter. Second, defendant has been provided with open file discovery, including a transcript of a videotaped interview of J.P. conducted at the Seacoast Child Advocacy Center. This video thoroughly details J.P.'s allegations and is now available for viewing by defendant, thereby allowing defendant to view J.P.'s demeanor.

To the extent that defendant sought the deposition to uncover contact information for certain witnesses, the court understands that this information was provided during the hearing and thereafter at the trial management conference. As to defendant's remaining reasons, the court finds, based on defendant's representations at hearing, that such a deposition would not provide defendant with any potential motives or theories of which he is not already aware. Because defendant did not show by a preponderance of the evidence that the deposition was necessary to ensure a fair trial, avoid surprise, or provide exculpatory evidence, defendant's motion is **DENIED**.

Through his fourth motion, defendant moves for the production of Seacoast Child Advocacy Center records and related discovery, asserting it is essential to his defense that he ascertain and develop information concerning J.P.'s prior psychiatric and psychological treatment. Defendant contends that information contained in these records may bear directly on J.P.'s credibility.

At hearing, the State represented that J.P. has an alcohol abuse problem and has received treatment for it. The State further indicated that it had no information to indicate that J.P. had other substance abuse problems.

The court then ruled from the bench that the State must use its best efforts to produce any records of alcohol abuse and provide them to the court for *in camera* inspection. The State provided the court with records from Exeter Psychological, Seacoast Mental Health, Hampstead Hospital, and Phoenix House. Upon review of these records, the court has determined that most of the information contained in them would not lead to the discovery of admissible evidence and should remain confidential under the privilege.

There are a few items in the alleged victim's records which the defendant should know about and which justice requires be disclosed to defendant notwithstanding the privilege. This disclosure is necessary to protect defendant's right to prepare his defense and to assure a fair trial. First, it is clear from the records that J.P. has had a substance abuse problem not only with alcohol but also with marijuana and certain inhalants, the former being of greater concern. The records also show that at times J.P. has abused both prescription and over-the-counter medications, including prozac, ritalin, clonopin, percocet, caffeine pills, sleeping pills, cough syrup, dramamine, codeine, and possibly other so-called downers. The records do not show any use of hallucinogens by J.P.

Based upon the presentation of defendant's counsel at hearing, it is obvious that defendant is well aware of the fact that J.P. suffers from a number of emotional and psychological problems, which have occasionally led to her suicidal ideation. This court, however, does not perceive how

that evidence would be admissible at trial, whether on credibility or for any other purpose. It is noteworthy, though, and certainly fair game on the issue of credibility, that a Phoenix House diagnostic assessment of February 20, 2001 specifically refers to the fact that J.P. told her counselor that she was experiencing "trouble with memory." This concludes those few parts of the records which in this court's judgment are discoverable notwithstanding the privilege. The motion is therefore **GRANTED in part** and **DENIED in part**, consistent with this order. The records provided for the court's *in camera* review, which are contained in four large brown envelopes, shall be sealed.

Defendant's fifth motion seeks the State's disclosure of certain witnesses' identities and contact information. However, inasmuch as the information sought has since been provided to defendant either at hearing or during the trial management conference, this motion is moot.

Defendant's sixth motion seeks to introduce J.P.'s prior sexual activity to attack her credibility. Defendant relies on *State v. Howard*, 121 N.H. 53, 61 (1981), in support of his position. In *Howard*, the defendant was charged with having sexual relations with a twelve-year-old girl in violation of RSA 632-A:2, XI (now RSA 632-A:2,I(1)). The State sought to limit any testimony regarding the victim's prior sexual activity and the defendant objected. The Supreme Court held that "a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the [victim] has the experience and ability to contrive a statutory rape charge against [defendant]." *Id.* at 61. In coming to this conclusion, the Supreme Court explained its belief

> that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore,

> it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experiences, it would be possible for them to provide detailed realistic testimony concerning an incident that may never have happened.

Id.

The Court finds the case at hand distinguishable from *Howard*. The victim here is a fifteen-year-old girl. Contrary to defendant's assertions, the court does not believe that the average juror would perceive the average fifteen-year-old as a sexual innocent. Rather, given today's society, the court is of the opinion that the average fifteen-year-old has sufficient knowledge of sexual conduct to take herself outside the purview of *Howard*.

For the reasons stated above, the court rules that defendant has failed to show the relevance of J.P.'s prior sexual activity. Defendant's motion is accordingly **DENIED**. Given the subject matter of this motion, the court orders that the motion be sealed.

Through his seventh motion, defendant seeks to sever the one misdemeanor count for violation of privacy from the remaining counts. There being no objection, defendant's motion is **GRANTED**. *See State v. Ramos*, ___ N.H. ___ (Feb. 14, 2003).

Defendant's last motion is for production of a videotaped interview of J.P. taken at Seacoast Child Advocacy Center on or about November 28, 2001. At hearing, the State agreed to

allow defendant to view this videotape at the Rockingham County Attorney's office. Therefore, this motion is moot.

In sum, defendant's two motions to suppress, his motion to depose J.P., and his motion to introduce J.P.'s prior sexual activity are **DENIED**. Defendant's motion to sever is **GRANTED**, and his motion for production of treatment records is **GRANTED in part** and **DENIED in part** consistent with this narrative order. Defendant's remaining motions are moot.

So ORDERED.

Date: April 10, 2003

/s/
PHILIP S. HOLLMAN
Presiding Justice

APPENDIX C

INDICTMENTS
See Fold Out Exhibits

RJW

AGGRAVATED FELONIOUS SEXUAL ASSAULT

DOB: 04/15/37 ELC: all RSA: 632-A:2, I (i) Penalty: 10-20 yrs/$4000fine

Entries Above This Line Are Not Part of Indictment

The State of New Hampshire

SUPERIOR COURT

INDICTMENT

At the Superior Court, holden at Brentwood, in the County of Rockingham on the fifth day of March, in the year of our Lord two thousand and two, the Grand Jurors for the State of New Hampshire, upon their oath, present that

Francis Kepple
of
17 Foggs Corner Road, Seabrook, NH 03874

aforesaid with force and arms, committed the crime of
AGGRAVATED FELONIOUS SEXUAL ASSAULT

On or between the 1st day of July and the 30th day of August
In the year of our Lord Two thousand and one
at Raymond, in the County of Rockingham

In that:

1. Francis Kepple knowingly,
2. engaged in sexual penetration of J.P., a minor female child with a D.O.B. of 10/23/85 who at the time of the assault was 13 years of age or older and under 16 years of age,
3. by performing cunnilingus upon J.P.,
4. the said Francis Kepple not being legally married to J.P. but related by affinity as J.P.'s step-grandfather.

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Tom Reid D.C.A.

James M. Reams,
Rockingham County Attorney

This is a true bill.

William F. Yule

Grand Jury Foreman

FORMAL ARRAIGNMENT WAIVED AND
~~PLEA OF~~ NOT GUILTY ENTERED.

, CLERK
3/28/02

INDICTMENT #
02 - S - 055.2

RJW

AGGRAVATED FELONIOUS SEXUAL ASSAULT

DOB: 04/15/37 ELC: all RSA: 632-A:2, I (i) Penalty: 10-20 yrs/$4000fine

Entries Above This Line Are Not Part of Indictment

The State of New Hampshire

SUPERIOR COURT

INDICTMENT

At the Superior Court, holden at Brentwood, in the County of Rockingham on the fifth day of March, in the year of our Lord two thousand and two, the Grand Jurors for the State of New Hampshire, upon their oath, present that

Francis Kepple
of
17 Foggs Corner Road, Seabrook, NH 03874

aforesaid with force and arms, committed the crime of
AGGRAVATED FELONIOUS SEXUAL ASSAULT

On or between the 1st day of July and the 30th day of August
In the year of our Lord two thousand and one
at Raymond, in the County of Rockingham

In that:

1. Francis Kepple knowingly,
2. engaged in sexual penetration of J.P., a minor female child with a D.O.B. of 10/23/85
3. by performing cunnilingus upon J.P.,
4. through concealment or by the element of surprise before J.P. had an adequate chance to flee or resist as J.P. was under the influence of intoxicating liquor.

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Tom Reid D.C.A.

James M. Reams,
Rockingham County Attorney

This is a true bill.

William F. Joyce

Grand Jury Foreman

INDICTMENT #
02-S-0553

DOB: 04/15/37 ELC: ENDANGERING THE WELFARE OF A CHILD
Offense RSA: 639:3

RJW

Penalty: 10-20 years/$4000.00 fine

Entries Above This Line Are Not Part of Indictment

ROCKINGHAM, SS

The State of New Hampshire

SUPERIOR COURT

INDICTMENT

At the Superior Court, holden at Brentwood, in the County of Rockingham on the fifth day of March, in the year of our Lord two thousand and two, the Grand Jurors for the State of New Hampshire, upon their oath, present that

Francis Kepple
of
17 Foggs Corner Road, Seabrook, NH 03874

aforesaid with force and arms, committed the crime of
ENDANGERING THE WELFARE OF CHILD

On or between the 1st day of July and the 30th day of August,
in the year of our Lord, two thousand and one
at Raymond, in the County of Rockingham

1. In that Francis Kepple knowingly,
2. endangered the welfare of J.P., a child under the age of 18 years of age
3. by purposely violating a duty of care he owed to J.P. as J.P.'s step-grandfather
4. when Francis Kepple provided an intoxicating alcoholic beverage to J.P., which J.P. consumed causing J.P.'s intoxication,
5. the said Francis Kepple then performing cunnilingus upon J.P., an act of sexual penetration as defined within RSA 632-A:1,v.

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Tom Reid D.C.A.

James M. Reams,
Rockingham County Attorney

This is a true bill.

William F. Joyce

Grand Jury Foreman

INDICTMENT #
02 - S - 0554

RJW

CRIMINAL SOLICITATION

DOB: 04/15/37 ELC: Offense RSA: 629:2, Penalty: 10-20 yrs. $4,000 fine

Entries Above This Line Are Not Part of Indictment

ROCKINGHAM, SS

The State of New Hampshire
INDICTMENT

SUPERIOR COURT

At the Superior Court, holden at Brentwood, in the County of Rockingham on the fifth day of March, in the year of our Lord two thousand and two, the Grand Jurors for the State of New Hampshire, upon their oath, present that

Francis Kepple
of
17 Foggs Corner Road, Seabrook, NH 03874

aforesaid with force and arms, committed the crime of
CRIMINAL SOLICITATION

On or between the 1st day of July and the 30th day of August,
in the year of our Lord, two thousand and one
at Raymond, in the County of Rockingham

In that:

1. Francis Kepple purposely,
2. with the purpose that J.P., a minor female child with a date of birth of 10/23/85, engage in an aggravated felonious sexual assault, a crime defined within RSA 632-A:2,
3. requested that J.P. perform oral sex upon him as he stood at the end of a bed while fondling his exposed penis and asked J.P. if she wanted to perform fellatio upon him.

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

D.C.A.

James M. Reams,
Rockingham County Attorney

This is a true bill.

Grand Jury Foreman

INDICTMENT #

02-S-0555

APPENDIX D

MEMORANDUM OF APPROVAL OF ONE-PARTY INTERCEPTION OCCURRING IN NEW HAMPSHIRE PURSUANT TO RSA 570-A:2, II(d)

Requesting Officer and Agency: Sgt. Shawm Coope, Raymond Police Department

Date and Time of Request: 9:45 a.m., December 12, 2001

Target or Targets: Francis E. Kepple, dob 4/15/37, 17 Fog Corner Road, Seabrook, N.H. (603) 474-7064

Crimes Under Investigation: Aggravated Felonious Sexual Assault

Authorization Requested: to intercept and record telephonic conversations between [victim's name redacted] (dob 10/23/85) of 5 Grandview Terrance, Sandown, N.H., Francis Kepple, and any other person who may answer the telephone at Mr. Kepple's residence, between the hours of 4:00p.m. and 10:00p.m. on December 12, 2001.

Authorization Approved: as requested

Date and time of Approval: December 12, 2001, 10:10 a.m.

Basis for determining that reasonable suspicion for authorization exists:

Sgt. Coope provided me with the following information:

On October 8, 2001, the Raymond Police Department received a report from a guidance counselor at the Timberlane High School that [name redacted] (dob 10/23/85) of 5 Grandview Terrace, Sandown, N.H., had disclosed to him that she had been sexually assaulted. An interview of [name redacted] was subsequently conducted on 11/28/01 by Kate Adler of the Child Advocacy Center, while Sgt. Coope observed. During that interview, [redacted] gave the following information:

Francis Kepple is [redacted]'s step-grandfather. Sometime during the month of July, 2001, he asked [redacted] if she was interested in helping him clean a house in Raymond, to earn some money. Kepple does various handy-man jobs and this was one of them. When [redacted] said she would help, Kepple told her to make sure and bring her bathing suit, because there was a pool at the house. Kepple picked [redacted] up at the house, as arranged, and drove her to a duplex in Raymond. Their job was to clean one-half of the house, which was vacant. Upon their arrival, [redacted] noticed there was no pool, which gave her pause. As they were cleaning, [redacted] came upon a bottle of vodka. She has had a drinking problem, which is common knowlege among her family members, including Kepple. When she asked Kepple about the vodka, he said that he had brought it for her and warned her not to drink too much. He had some beer, which he was drinking. [Redacted] was not able to say what size the bottle was, but estimated that she drank about ½ of the vodka. After awhile, she began to feel sick. Kepple told her to go lie down on a bed, which she did and ultimately

feel asleep. [*Sic.*] When she woke, or was in the process of waking up, she saw Kepple standing at the foot of the bed, naked, staring at her. Her pants and underwear had been removed. Kepple them performed oral sex on her and asked if he could take pictures. She was not fully awake at that point, but said no. She was too scared at that point to move or run away. When she fully realized what was going on, she jumped up, got dressed, and ran outside. Kepple caught up to her in his truck, told her to get in, and drove her home. Along the way, he told her that it was her fault because she drank too much, and warned her not to tell anyone what had happened because he would go to jail for a long time. [Redacted] first revealed the assault to a friend, Jen Waugh.

Sgt. Coope interviewed Jen Waugh. She said that sometime in October, [redacted] told her that she had been sexually assaulted by her grandfather. Jen recounted [redacted]'s disclosure in detail, which closely fit the account given to Kate Adler during the November 28th interview.

[Redacted] has agreed to call Kepple and attempt to get him to speak about the assault, and has consented to having that conversation recorded. [Redacted]'s parents have also consented to such a procedure. It is planned that [redacted]'s mother will call Kepple's wife and invite her to go shopping this evening, leaving Kepple alone in the house to answer the phone. (Sgt. Coope indicated that the family thought Kepple would be unlikely to talk about the incident if his wife was at home.) It is anticipated that [redacted] will then call Kepple at his home, sometime between the hours of 4:00 and 10:00 p.m.

Date and Time Memorandum Completed: December 12, 2001, 6:00 p.m.

/s/
Ann M. Rice
Senior Assistant Attorney General

APPENDIX E

CONSTITUTIONS AND STATUTES

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2511(2) (c) (2000)

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2516(2) (2000)

The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2517 (2000)

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in

accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

[Subsection 6, relating to foreign intelligence, national security, and the like, is omitted.]

N.H. Rev. Stat. Ann. § 570-A:2 (2001)

I. A person is guilty of a class B felony if, except as otherwise specifically provided in this chapter or without the consent of all parties to the communication, the person:

(a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any telecommunication or oral communication;

(b) Wilfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

(1) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in telecommunication, or

(2) Such device transmits communications by radio, or interferes with the transmission of such communication, or

(3) Such use or endeavor to use (A) takes place on premises of any business or other commercial establishment, or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment; or

(c) Wilfully discloses, or endeavors to disclose, to any other person the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the interception of a

telecommunication or oral communication in violation of this paragraph; or

(d) Willfully uses, or endeavors to use, the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the interception of a telecommunication or oral communication in violation of this paragraph.

I-a. A person is guilty of a misdemeanor if, except as otherwise specifically provided in this chapter or without consent of all parties to the communication, the person knowingly intercepts a telecommunication or oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication, but without the approval required by RSA 570-A:2, II(d).

II. It shall not be unlawful under this chapter for:

(a) Any operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a telecommunication, to intercept, disclose, or use that communication in the normal course of employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication; provided, however, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) An officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law

enforcement officer who, pursuant to this chapter, is authorized to intercept a telecommunication or oral communication.

(c) Any law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry on the person an electronic, mechanical or other device which intercepts oral communications and transmits such communications by radio.

(d) An investigative or law enforcement officer in the ordinary course of the officer's duties pertaining to the conducting of investigations of organized crime, offenses enumerated in this chapter, solid waste violations under RSA 149-M:9, I and II, or harassing or obscene telephone calls to intercept a telecommunication or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter. The memorandum shall be kept on file in the office of the attorney general.

(e) Where the offense under investigation is defined in RSA 318-B [relating to drug offenses], the attorney general to delegate authority under RSA 570-A:2, II(d) to a county attorney. The county attorney may exercise this authority only in the county where the county attorney serves. The attorney general shall, prior to the effective date of this subparagraph, adopt specific guidelines under which the county attorney may give authorization for such interceptions. Any county attorney may further delegate authority under this

section to any assistant county attorney in the county attorney's office.

(f) An officer, employee, or agent of the Federal Communications Commission, in the normal course of employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a telecommunication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(g) Any law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry on the person an electronic, mechanical or other device which intercepts oral communications and transmits such communications by radio.

(h) Any municipal, county, or state fire or police department, the office of emergency management as created by RSA 107-C:3, the bureau of emergency communications as defined by RSA 106-H, or any independently owned emergency service, and their employees in the course of their employment, when receiving or responding to emergency calls, to intercept, record, disclose or use a telecommunication, while engaged in any activity which is a necessary incident to the rendition of service or the protection of life or property.

(i) Any public utility regulated by the public utilities commission, and its employees in the course of employment, when receiving central dispatch calls or calls for emergency service, or when responding to central dispatch calls or calls for emergency service, to intercept, record, disclose or use a telecommunication, while engaged in any activity which is a necessary incident to the rendition of service, or the protection of life and property. Any public utility recording calls pursuant to this subparagraph shall provide an automatic

tone warning device which automatically produces a distinct signal that is repeated at regular intervals during the conversation. The public utilities commission may adopt rules relative to the recording of emergency calls under RSA 541-A.

(j) A uniformed law enforcement officer to make an audio recording in conjunction with a video recording of a routine stop performed in the ordinary course of patrol duties on any way as defined by RSA 259:125, provided that the officer shall first give notification of such recording to the party to the communication.

N.H. Rev. Stat. Ann. § 570-A:7 (2001)

The attorney general, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of telecommunications or oral communications, and such judge may grant, in conformity with RSA 570-A:9, an order authorizing or approving the interception of telecommunications or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, when such interception may provide, or has provided, evidence of the commission of organized crime, as defined in RSA 570-A:1, XI, or evidence of the commission of the offenses of homicide, kidnapping, gambling, theft as defined in RSA 637, corrupt practices as defined in RSA 640, child pornography under RSA 649-A, computer pornography and child exploitation under RSA 649-B, criminal conduct in violation of the securities law, as defined in RSA 421-B:3, 421-B:4, 421-B:5, 421-B:19, and 421-B:24, criminal conduct in violation of the security takeover disclosure laws, as defined in RSA 421-A:3, 421-A:7, 421-A:8, 421-A:11, and

421-A:13, robbery as defined in RSA 636:1, arson as defined in RSA 634:1, hindering apprehension or prosecution as defined in RSA 642:3, tampering with witnesses and informants as defined in RSA 641:5, aggravated felonious sexual assault as defined in RSA 632-A:2, felonious sexual assault as defined in RSA 632-A:3, escape as defined in RSA 642:6, bail jumping as defined in RSA 642:8, insurance fraud as defined in RSA 638:20, dealing in narcotic drugs, marijuana, or other dangerous drugs, hazardous waste violations under RSA 147-A:4, I, or any conspiracy to commit any of the foregoing offenses.

N.H. Rev. Stat. Ann. § 570-A:8 (2001)

I. Any law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any telecommunication or oral communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

II. Any law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any telecommunication or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of the officer's official duties.

III. Any person who has received, by any means authorized by this chapter, any information concerning a telecommunication or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication

or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

IV. No otherwise privileged telecommunication or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

V. When a law enforcement officer, while engaged in intercepting telecommunications or oral communications in the manner authorized herein, intercepts telecommunications or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in paragraphs I and II. Such contents and any evidence derived therefrom may be used under paragraph III, when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

N.H. Rev. Stat. Ann. § 632-A:2 (1996 and Supp. 2002)

I. A person is guilty of the felony of aggravated felonious sexual assault if he engages in sexual penetration with another person under any of the following circumstances:

(a) When the actor overcomes the victim through the actual application of physical force, physical violence or superior physical strength.

(b) When the victim is physically helpless to resist.

(c) When the actor coerces the victim to submit by threatening to use physical violence or superior physical

strength on the victim, and the victim believes that the actor has the present ability to execute these threats.

(d) When the actor coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim believes that the actor has the ability to execute these threats in the future.

(e) When the victim submits under circumstances involving false imprisonment, kidnapping or extortion.

(f) When the actor, without the prior knowledge or consent of the victim, administers or has knowledge of another person administering to the victim any intoxicating substance which mentally incapacitates the victim.

(g) When the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship:

(1) Acts in a manner or for purposes which are not professionally recognized as ethical or acceptable; or

(2) Uses this position as such provider to coerce the victim to submit.

(h) When, except as between legally married spouses, the victim is mentally defective and the actor knows or has reason to know that the victim is mentally defective.

(i) When the actor through concealment or by the element of surprise is able to cause sexual penetration with the victim before the victim has an adequate chance to flee or resist.

(j) When, except as between legally married spouses, the victim is 13 years of age or older and under 16 years of age and:

(1) the actor is a member of the same household as the victim; or

(2) the actor is related by blood or affinity to the victim.

(k) When, except as between legally married spouses, the victim is 13 years of age or older and under 18 years of age and the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit.

(l) When the victim is less than 13 years of age.

(m) When at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act.

(n) When the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit under any of the following circumstances:

(1) When the actor has supervisory authority over the victim by virtue of the victim being incarcerated in a correctional institution or juvenile detention facility; or

(2) When a probation or parole officer has supervisory authority over the victim while the victim is on parole or probation or under juvenile probation.

Consent of the victim under any of the above circumstances in subparagraph (n) shall not be considered a defense.

II. A person is guilty of aggravated felonious sexual assault without penetration when he intentionally touches whether directly, through clothing, or otherwise, the genitalia of a person under the age of 13 under circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification.

III. A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

N.H. Rev. Stat. Ann. § 629:2 (1996 and Supp. 2002)

I. A person is guilty of criminal solicitation if, with a purpose that another engage in conduct constituting a crime, he commands, solicits or requests such other person to engage in such conduct.

II. It is an affirmative defense to prosecution under this section that the actor renounced his criminal purpose by persuading the other not to engage in the criminal conduct or by otherwise preventing commission of the crime under circumstances manifesting a purpose that it not occur.

III. It is no defense to prosecution under this section that the person solicited would be immune from liability for engaging in the criminal conduct by virtue of irresponsibility, incapacity or exemption.

IV. The penalty for criminal solicitation is the same as that authorized for the crime that was solicited, except that in the case of solicitation of murder the punishment shall be imprisonment for a term of not more than 30 years.

N.H. Rev. Stat. Ann. § 639:3 (1996)

I. A person is guilty of endangering the welfare of a child or incompetent if he knowingly endangers the welfare of a child under 18 years of age or of an incompetent person by purposely violating a duty of care, protection or support he owes to such child or incompetent, or by inducing such child or incompetent to engage in conduct that endangers his health or safety.

II. In the prosecution of any person under this section, the tattooing by any person of a child under the age of 18 constitutes endangering the welfare of such child.

III. In the prosecution of any person under this section, the solicitation by any person of a child under the age of 16 to engage in sexual activity as defined by RSA 649-A:2, III for the purpose of creating a visual representation as defined in RSA 649-A:2, IV, or to engage in sexual penetration as defined by RSA 632-A:1, V, constitutes endangering the welfare of such child.

IV. A person who pursuant to the tenets of a recognized religion fails to conform to an otherwise existing duty of care or protection is not guilty of an offense under this section.

V. A person who endangers the welfare of a child or incompetent by violating paragraph III of this section is guilty of a class B felony. All other violations of this section are misdemeanors.

Some of the above statutes have undergone minor amendments since the time of the underlying events. However, all of the statutes appear above as they did in 2001, which was the year that the charged incident occurred and the year that the wiretap which is the subject of this petition was approved and implemented.

APPENDIX F

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss. NOS. 02-S-552, -553, -554, -555, -556

SUPERIOR COURT

State of New Hampshire

v.

Francis Kepple

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF TAPE-RECORDED TELEPHONE CONVERSATION

The defendant, pursuant to RSA 570-A:6, respectfully moves this Court to suppress any evidence of the contents a certain tape-recorded telephone conversation which took place between the defendant and the alleged victim in this case on or about December 12, 2001, and which the State secretly tape-recorded while acting under color of RSA 570-A:2, II(d), on the grounds that the method and manner in which the State orchestrated that intercept and recorded that conversation violated the defendant's rights under the Fourth Amendment to the United States Constitution; Part 1, Article 19, of the New Hampshire Constitution; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. §§ 2510-2522;[1] and the terms of the New Hampshire wiretapping and eavesdropping statute itself, RSA 570-A. The defendant moves that the Court suppress all evidence of the contents of that conversation, as well as all derivative evidence which constitutes the fruits thereof. As facts in support of his motion, the defendant states the following:

1. This is a prosecution for felonious sexual assault upon a minor, together with related offenses. The State contends that in or around July 2001, the defendant performed oral sex upon the complainant, a female who was then fifteen years old, by plying her with alcohol until she was in a drunken, submissive state, too intoxicated to be cognizant of his actions and too drunk to protest, let alone resist, them. The defendant denies that the incident ever took place and attributes the accusation to the complainant's lengthy history of drug and alcohol abuse, her sordid family history, and to mental and emotional instability generally.

2. On December 12, 2001, acting under color of the New Hampshire electronic wiretapping and eavesdropping statute, RSA 570-A, the State orchestrated and carried out a so-called "one-party intercept" on a telephone conversation between the defendant and the complainant. At the State's instructions, the complainant placed a telephone call to the defendant and conversed with him for several minutes. Unknown to the defendant at the time, law enforcement officials were tape-

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[1] State wiretapping statutes must conform to the requirements of their federal counterpart, 18 U.S.C. §§ 2510-2522, or else they are invalid. 18 U.S.C. § 2516(2). *See, e.g., United States v. Ward*, 808 F. Supp. 803, 805-06 (S.D. Ga. 1992); *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988).

recording the telephone conversation between himself and the complainant.

3. In obtaining and implementing a one-party intercept, the State is required to comply with the procedures specified in RSA 570-A:2, II(d). That statute requires that, before any intercept may be conducted, it must be authorized by the Attorney General, by the Deputy Attorney General, or by an assistant attorney general specially designated by the Attorney General to give such authorization; and the authorizing official must specifically find that reasonable suspicion exists to believe that evidence of criminal conduct will be derived from such interception. RSA 570-A:2, II(d).

4. Additionally, under the New Hampshire wiretapping statute the suspected criminal activity as to which evidence is sought to be detected and admitted into evidence must relate to one of the specific crimes enumerated in RSA ch. 570-A, and more specifically RSA 570-A:2, II(d) and -A:7 (organized crime, solid waste violations, harassing or obscene telephone calls, homicide, kidnapping, gambling, theft, corrupt practices, child pornography, computer pornography, child exploitation, securities law violations, robbery, arson, hindering apprehension or prosecution, witness tampering, aggravated felonious sexual assault, felonious sexual assault, escape, bail jumping, insurance fraud, drug offenses, hazardous waste violations, and conspiracy).

5. The statutory mandate to authorize such electronic wiretapping and eavesdropping is further restricted by the federal wiretapping statute, 18 U.S.C. § 2510 *et seq.*, which limits to certain types of offenses the authority of the State to approve and implement such intercepts. 18 U.S.C. § 2516(2). The federal wiretapping statute preempts state law in the field of electronic surveillance. *United States v. Miller*,

116 F.3d 641 (2d Cir. 1997), *cert. denied*, 524 U.S. 905 (1998). A State may not authorize or conduct one-party intercepts with a new toward gathering evidence [*sic*] of violations of crimes other than those specifically enumerated in 18 U.S.C. § 2516(2). *Id.*; *United States v. Ward*, 808 F. Supp. 803, 805-06 (S.D. Ga. 1992); *United States v. Geller*, 560 F. Supp. 1309, 1312 (E.D. Pa. 1983), *aff'd*, *sub nom. United States v. DeMaise*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867, 870-72 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988) (defendants, having raised but failed to pursue issue of lawfulness of wiretap in summons enforcement proceeding, were foreclosed from re-raising the same issue in subsequent contempt proceeding); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980). Further, if in the course of carrying out an otherwise-lawful intercept the State acquires evidence of crimes not falling within the list of enumerated offenses, then the prosecutor must apply to the Court, "as soon as practicable," for a finding that the contents of the conversation were otherwise intercepted in accordance with the terms and provisions of the statute and that the evidence may be used for the nonlisted offense. RSA 570-A:8, V.

6. The New Hampshire Legislature has exceeded the authority conferred upon it by the federal wiretapping and eavesdropping statute, 18 U.S.C. §§ 2510-2522, to authorize and approve one-party intercepts and other clandestine wiretapping, in that it has purported to authorize such intercepts and wiretapping in connection with crimes not enumerated in or authorized by the federal statute. *See* 18 U.S.C. § 2516(2). Section 2516(2), 18 U.S.C., authorizes a State to allow to approve electronic wiretapping and eavesdropping only in connection with the crimes of "murder,

kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property," or conspiracy to commit any of the foregoing crimes. *Id.* The New Hampshire statute, by contrast, purports to authorize the Attorney General to approve one-party intercepts in connection with the investigation of numerous offenses not specified in the federal statute, such as solid and hazardous waste violations, harassing or obscene telephone calls, child pornography, computer pornography, child exploitation, securities law violations, witness tampering, aggravated felonious sexual assault, escape, bail jumping, and insurance fraud. *See* RSA 570-A:2, II(d), -A:7. None of the latter set of offenses is authorized by the federal wiretapping statute.

7. Because of the breadth of cases [*sic*; "crimes" intended] purportedly authorized by the New Hampshire statute but not permitted to the States by section 2516(2), Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522, the New Hampshire statute is unconstitutional on its face and/or violates the aforementioned federal statute. *See United States v. Ward*, 808 F. Supp. 803, 805-06 (S.D. Ga. 1992); *United States v. Geller*, 560 F. Supp. 1309, 1312 (E.D. Pa. 1983), *aff'd, sub nom. United States v. DeMaise*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *United States v. Millstone Enterprises, Inc.*, 684 F. Supp. 867, 870-72 (W.D. Pa.), *rev'd on other grounds*, 864 F.2d 21 (3d Cir. 1988); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980). Alternatively, the New Hampshire statute is unconstitutional and/or violates the federal wiretapping act as applied to the facts of this case. *Id.*

8. Further, even if the New Hampshire statute is not unconstitutional on its face or violative of the authority granted

it under its federal counterpart, the State violated the terms of the New Hampshire statute in the manner further described below, and therefore suppression is warranted.

7. It is fundamental, under both federal and state law, that the wiretapping statutes are to be narrowly construed and that the procedural requirements for authorizing and ratifying intercepts are to be strictly enforced, inasmuch as statutes authorizing wiretapping and eavesdropping are in derogation of the citizen's right to privacy and his right to be free from unreasonable searches and seizures under the Fourth Amendment and Part 1, Article 19, of the New Hampshire Constitution. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974); *United States v. King*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), and *cert. denied sub nom. Light v. United States*, 414 U.S. 846 (1973); *United States v. Ward*, 808 F. Supp. 803 (S.D. Ga. 1992); *State v. Moccia*, 119 N.H. 169, 400 A.2d 44 (1979); *State v. Lee*, 113 N.H. 313, 307 A.2d 827 (1973); 1 Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 143 (3d ed. 1997).

8. In the instance of the New Hampshire wiretapping statute, RSA 570-A, the State must strictly comply with the three-step requirements of RSA 570-A:2, II(d) for obtaining authorization for and implementing the intercept, and it must comply with all other statutory requirements incident to intercepting the oral communications and introducing them into evidence at trial. *Id.* If either the Attorney General or the Deputy Attorney General does not personally approve the intercept himself, then the Attorney General must designate an assistant attorney general to approve the intercept, and the assistant must specifically find that there is a reasonable suspicion that evidence of criminal conduct will be derived from the interception. RSA 570-A:2, II(d). Furthermore, if

the authorization for the intercept is given orally, then the Attorney General, Deputy Attorney General, or designated assistant attorney general, as the case may be, must prepare a memorandum memorializing the authorization and the basis therefor within 72 hours of the time that the authorization is given. *Id.*

9. In this case, the State has provided the defendant with a copy of what purports to be a written memorandum complying with the last-mentioned requirement of that statute, memorializing in writing the verbal authorization given by Ann M. Rice, Esquire, Senior Assistant Attorney General, to administer the intercept and reciting the essential basis therefor. (A copy of the memorandum is appended hereto as Attachment A.)

10. However, the discovery package produced by the prosecutor's office in this proceeding contains no evidence that, *before* the authorization for the intercept was given, the Attorney General ever designated the author of that memorandum, Ms. Rice, to review the facts of the alleged victim's complaint and to approve the one-party intercept directed at this defendant, and the defendant puts the State to its proof on that issue.

12. Additionally, Assistant Attorney General Rice's memorandum does not mention the statute or statutes which are claimed to have been violated by the defendant, and as to which evidence of such violation was being sought to be detected and obtained via the prospective intercept, though she does mention felonious sexual assault. (See Attachment A.)

13. RSA 570-A:8, V provides that whenever a law enforcement officer, while engaged in intercepting

telecommunications or oral communications pursuant to the New Hampshire wiretapping statute, RSA ch. 570-A, intercepts communications relating to other offenses, i.e., offenses *other than* those specified in the order of authorization or approval, the State shall, "as soon as practicable," apply to the Court for approval and for a determination that the contents of the communication were otherwise lawfully intercepted in accordance with the provisions of said chapter (RSA 570-A). Otherwise, they are inadmissible. *Id.*

14. The State has never applied to the Court to ratify the use of the wiretap evidence obtained via the subject intercept, despite the fact that the State used that evidence as the basis for the defendant's indictment for violation of crimes other than those enumerated in the New Hampshire wiretap statute (*viz.*, criminal solicitation of a minor, RSA 629:2; and endangering the welfare of a child, RSA 639:3). If has now been more than a year since the interception was accomplished and nearly a year since the defendant was indictment [*sic*], and still the State has not filed a motion with this Court for authority to use the intercepted evidence and a determination that it was properly obtained. Ergo, the State plainly did not file its application "as soon as practicable," and it is in clear violation of the aforecited provision, RSA 570-A:8.

15. Moreover, inasmuch as Assistant Attorney General Rice's memorandum does not specify the statute(s) for whose alleged violation the one-party intercept is to be used, it is impossible to tell whether she was purporting to authorize the use of the one-party intercept to gather evidence of the commission of a crime for which such intercepts are ostensibly authorized by the wiretap statute (aggravated felonious sexual assault and felonious sexual assault, RSA

632:A-2, -3) or one of those crimes for which they are plainly not (criminal solicitation, RSA 629:2, and endangering the welfare of a child, RSA 639:3). Furthermore, since the State anticipates trying these various charges together, the unlawfully obtained tape-recordings, if received into evidence, will be admitted both in support of those charges for which they are authorized and in support of those for which they are not. Therefore, the State's violation of RSA 570-A:8, V in failing to seek judicial ratification for the use of the latter class of charges is material, and the only remedy is to exclude such evidence altogether.

15. For all of the reasons given above, the State has violated the provisions of the New Hampshire wiretap statute, RSA 570-A, in obtaining the authorization for and executing the first-party intercept. Accordingly, pursuant to RSA 570-A:6, all evidence of the intercepted communications must be suppressed.

16. Pursuant to Superior Court Rule 57-A, the defendant's undersigned counsel hereby certifies that on Friday, February 7, 2003, at approximately 3:28 p.m., he placed a telephone call to Robert J. Watkins, Esquire, Rockingham County Attorney, counsel of record for the State in the instant proceeding, with a view toward obtaining the latter's concurrence in the within motion, but that in reply to that call he received a recorded message stating that due to inclement weather, the Rockingham County Attorney's office was closed. Therefore, Mr. Watkins' position on this motion could not be ascertained.

WHEREFORE, the defendant respectfully prays that the Court enter an order suppressing (a) all evidence of the contents of the recorded telephone conversation between the defendant and the alleged victim in this case which took place

on or about December 12, 2001 and which was recorded via a one-party intercept; and (b) all derivative evidence which was subsequently obtained by the State as a direct or indirect result of that one-party intercept, specifically including but not limited to the fruits of a search warrant which was executed on December 14, 2001. (A companion motion directed to that search warrant is being filed concurrently herewith.)

/s/

Duncan J. MacCallum
536 State Street
Portsmouth, New Hampshire 03801
(603) 431-1230
Attorney for Defendant

APPENDIX G

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss. **NOS. 02-S-552, -553, -554, -555, -556**

SUPERIOR COURT

State of New Hampshire

v.

Francis Kepple

DEFENDANT'S MOTION TO ORDER PRODUCTION OF TRANSCRIPT OF GRAND JURY PROCEEDINGS

The defendant respectfully moves this Court to order the State to generate a complete transcript of the proceedings before the grand jury which resulted in the indictments in the above-captioned case. As grounds in support of his motion, the defendant states the following:

1. On April 10, 2003, this Court denied the defendant's motion to suppress the fruits of a one-party intercept which had been conducted by the State on December 12, 2001 while acting under color of RSA 570-A:2, II(d).

2. The defendant had contended, *inter alia*, that regardless of whether or not New Hampshire's wiretapping statute permissibly authorized the State to use electronic

eavesdropping for the purpose of investigating and gathering evidence of the crime of aggravated felonious sexual assault, the State had violated the statute by presenting wiretap evidence to the grand jury for the purpose of obtaining indictments against the defendant for the crimes of criminal solicitation of a minor (RSA 629:2) and endangering the welfare of a child (RSA 639:3), two crimes which are *not* among the ones for which wiretapping and electronic eavesdropping are authorized, and by presenting that evidence to the grand jury without first obtaining judicial approval of such use.

3. At the March 28, 2003 hearing on the defendant's motion to suppress, the State (in the person of its trial counsel, Robert J. Watkins, Esquire) was directly asked whether the State had presented evidence of the first-party intercept to the grand jury which issued Indictments #02-S-554 (endangering the welfare of a minor) and #02-S-555 (criminal solicitation). In response, Mr. Watkins gave an equivocal answer, and he never firmly committed himself to a position as to whether the first-party intercept evidence had, or had not, been used by the State in obtaining the last-mentioned indictments.

4. Had the Court granted the defendant's motion and suppressed the evidence, this issue would have been moot. However, inasmuch as the Court denied the motion it now becomes a matter of importance, for purposes of appeal, to know whether or not the State presented the wiretap evidence to the grand jury which subsequently returned the indictments.

5. For these reasons, the State should be ordered to generate a transcript of all relevant grand jury proceedings, so that the facts can be established and so that it may be

determined whether the State used the fruits of the first-party intercept to prevail upon the grand jury to issue Indictments #02-S-554 and #02-S-555.

6. Pursuant to Superior Court Rule 57-A, the undersigned hereby certifies that on April 11, 2003, at approximately 3:28 p.m., he placed a telephone call to the State's counsel of record, Robert J. Watkins, Esquire, with a view toward obtaining his concurrence in the within motion and/or narrowing the areas of dispute, but that Mr. Watkins was unavailable at the time and therefore his position could not be ascertained.

WHEREFORE, the defendant respectfully prays that the State be ordered to produce a complete transcript of the grand jury proceedings which resulted in the issuance of all of the indictments in this case.

/s/

Duncan J. MacCallum
536 State Street
Portsmouth, New Hampshire 03801
(603) 431-1230
Attorney for Defendant

APPENDIX H

THE STATE OF NEW HAMPSHIRE
ROCKINGHAM COUNTY
SUPERIOR COURT

No. 02-S-552-555

[April 15, 2003]

STATE OF NEW HAMPSHIRE	)
	)
v.	)
	)
FRANCIS KEPPLE	)
	)

Honorable Patricia C. Coffey
Presiding Justice, and a Jury
Rockingham County Superior Court
Brentwood, New Hampshire

[EXCERPTS FROM]
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
VOLUME II

APPEARANCES:

For the State: Robert J. Watkins, Esquire
Assistant County Attorney

For the Defendant: Duncan J. MacCallum, Esquire
Alexander G. Nossiff, Esquire

Official Court Reporter: Marcia B. Vadala, CSR, RMR

* * * *

[p.57]

Q. Was that conversation recorded?

A. Yes.

Q. Following the recording of that conversation -- first of all, what was it recorded on?

A. A standard cassette tape.

Q. And following that recording, did you mark that tape?

A. I did.

Q. How did you mark it?

A. I simply took a pen and it marked on the tape is our agency and investigative number.

MR. WATKINS: May I approach the witness?

THE COURT: You may.

(State's 2 marked for identification.)

BY MR. WATKINS:

Q. I show you what is marked as State's 2 for identification. Do you recognize that?

A. I do

Q. What is it?

A. A standard cassette tape. By the way it is marked, it is the tape that we are talking about right now. I put the defendant's name on there. The victim's name and also our agency case number which in this [p.58] case is 01 1439-OF.

Q. Inside of that case?

A. On the tape itself. Also the exact name, number, which I handwrote myself, 01 1439-OF.

Q. This appears to be the same tape you recorded on December 12 of 2001?

A. It does.

MR. WATKINS: Your Honor, at the moment I would like to publish this tape for the jury.

THE COURT: You mean play it?

MR. WATKINS: Yes.

MR. MacCALLUM: May we approach briefly?

THE COURT: Sure.

AT THE BENCH

MR. MacCALLUM: I am here just to make my record for appeal. Judge Hollman already ruled on the playing of this tape, but so my record is absolutely clear, we continue to object to it. I move *pro forma* for a mistrial, obviously, assuming that it is being improperly admitted into evidence, the contents are quite prejudicial.

THE COURT: Well, you are not going to get a mistrial.

MR. MacCALLUM: I didn't expect you to overrule Judge [p.59] Hollman's ruling, but for purposes of appeal, I want to make sure that I am not waiving the issue.

THE COURT: Okay. It is clear. Is that a transcript of it ?

MR. WATKINS: Yes.

THE COURT: Have you seen the transcript?

MR. MacCALLUM: I have. We take exception to it. We are not satisfied with the job that the transcriber did.

THE COURT: All right. I just wonder, I wondered if you had seen it and took exception. We will just play it for them.

BEFORE THE JURY

THE COURT: I ask the jury to stand up and cluster around the machine so they can hear it.

(Jury is now standing around the tape recorder.)

THE BAILIFF: Some of you could come around here.

(Tape played before the jury at 11:34 to 11:44 a.m.)

THE COURT: The jurors can return to their seats.

(The jurors returned to their seats.)

THE COURT: Mr. Watkins, has that been marked for ID?

MR. WATKINS: It has, Judge.

BY MR. WATKINS:

[p.60]

Q. Lieutenant, is that tape a fair and accurate representation of the conversation that you recorded on December 12, of 2001 between Jessica Piercy and the defendant Frank Kepple?

A. Yes, it is.

MR. WATKINS: I would ask at this time that that that [*sic*] tape be entered as State's Exhibit 2.

MR. MacCALLUM: We have an objection.

THE COURT: You may approach.

AT THE BENCH

THE COURT: Same objection?

MR. MACCALLUM: I have one additional one. There is no reason to introduce the tape in evidence because it has already been played to the jury. We don't re-read witnesses' testimony of the witnesses who have testified in court and admitting the tape in evidence falls in the same class.

THE COURT: No, it doesn't. It is more like demonstrative evidence that we would normally mark as an exhibit and send it in the jury room.

MR. WATKINS: There is a specific case on it Judge.

THE COURT: It is probably the Pam Smart case.

MR. WATKINS: It may be.

[p.61]

THE COURT: I don't know if that issue was appealed in that case, but the objection is overruled.

MR. MacCALLUM: We of course *pro forma* renew our motion for a mistrial.

THE COURT: It is overruled, too.

(The ID was struck on State's exhibit No. 2 and was received in evidence.)

BEFORE THE JURY

BY MR. WATKINS:

Q. Lieutenant, following a recording of this conversation, what was the next step in your investigation?

A. The next step was to apply for both a search warrant and arrest warrant.

Q. Where did you do that?

* * * *

APPENDIX I

Audio Tape Transcription of telephone conversation on December 12, 2001 between Jessica Piercey and Frank Kepple. [Transcribed by a representative in the employ of the State.]

JP: Jessica [last name of victim redacted in original for confidentiality purposes]

FK: Frank Kepple

SC: Det. Sgt. Shawn Coope
Raymond Police Department

V: Unknown male voice (visitor)

SC: Today is December 12, 2001, uhm...at 7:13 p.m. by authority of the New Hampshire Attorney General's Office in particular Assistant Attorney General, Ann Rice...a one party consent intercept recording is being implemented at #5 Grand View Terrace in Sandown, NH. The number...the telephone number is 887-6410. This is the phone number being recorded. The person that is giving consent for said intercept...uh... Douglass Piercey and Jessica Piercey...both at the same address. The one party intercept authorization has been requested um...by the speaker, Sgt. Shawn Coope of the Raymond New Hampshire Police Department. Um...the requested time frame is 4:00 p.m. to 10:00 p.m. on this date, the year 2001.

The tape shuts off momentarily then you hear a touch-tone number being dialed. The phone rings once and a man's voice says...

FK: Hello?

JP: Grandpa? (There is an undecipherable noise and voice in the background)

FK: Hello?

JP: Hi.

FK: Yeah.

JP: This is Jessica.

FK: Yeah.

JP: I have to talk to you.

FK: Yeah.

JP: I'm feeling very nervous and frustrated about everything and the stuff going on and I can't talk to anyone...cause...

FK: Yeah. Uh...about uh...

JP: About what happened when I went to your house in Raymond.

FK: Yeah.

JP: I need to talk to someone about this...like my guidance counselor or something...I'm loosing my mind. [*Sic.*] It's all I think about.

FK: Oh.

JP: You need to tell me what to do, because I don't know what to do.

FK: Well...uh, let me...let me go upstairs...

JP: Yeah, you do that...go upstairs...

FK: Uh, excuse me I've got to talk to...

V: All right, see you later.

FK: I got company. Honey I don't know what to tell ya. You know...because it bothers me too.

JP: It bothers you? Why does it bother you?

FK: Yes.

JP: It happened to me.

FK: Because it does. It does...it shouldn't of happened. (Sigh) And...uh I don't want to hurt anybody.

JP: Well, you already hurt me...why did you do this?

FK: I know...I know...

JP: You told me that you haven't been with any young girl before...why did I have to be the first one? Why did you have to do this to me?

FK: Um, I don't know. This is what's afflictin' my mind. Uh, What...why...

JP: This is what's put in your mind? That's what you have to say?

FK: No...uh...I'm...just listen to me...um...

JP: I'm not going to listen to you...you

FK: No...I

JP: You molest me, you put me through all this shit, and that's what you have to say this is what's in your mind.

FK: NO...I'm trying to rationalize why I did something like this...to you. Where I...I think so much of you. And I can't understand my own...why I did this...something like that to hurt you as badly as I knew...I know I hurt you badly. I can't...I can't understand why I did it...why I would take advantage of you.

JP: Did you know that I broke up with my boyfriend because of this? Because...thanks to you...I can't handle anyone touching me now...because I have flashbacks.

FK: You have what?

JP: I have flashbacks. My boyfriend will go to give me a hug and I think of you and what you did to me. So I had to break up with my boyfriend because of this.

FK: Well, you shouldn't of had to do that...but you should...

JP: I shouldn't of had to do that? What am I gonna do? I cry every single night because of you.

FK: Well, um...

JP: I mean, how...how could you have done this to me like that. I can't even think about talking to Gram anymore, because I'm ashamed and embarrassed.

FK: Well, I can understand that, but uh...but you have to...you have to...just try and talk to Gram and talk to people and...

JP: Talk to people about what?

FK: Just life. Just as...uh...oh, I don't know how to say it to you, I don't know what to say...I'm, I'm so...(Sigh-huhh) I just...um...I...I...feel so badly that I hurt you so badly, but I don't know what to say to you. This is my problem. I've been trying to think of some ways to talk to you and to get...ge...ge...get...get you...I figured this was bothering you...but I...

JP: You figured it was bothering me...

FK: I've been thinking about it. I've been fairly serious...It bothered...I think about it every night, like you do.

JP: Did you know that me and Jackie went shopping a couple of weeks ago? And we went through Raymond? The second I knew that we were in Raymond I started crying my eyes out. And she kept asking me what's wrong, what's wrong? And I said nothing...I don't want to talk about it. But I was still really messed up and as I said I'm scared but...well and I don't know what else to do.

FK: Ugh (sigh) I don't know what to do. It will kill Gram. Ugh (sigh)...

JP: Is that your way of like...trying to make me feel bad...saying It

FK: No...I'm not...I'm not try...

JP: would kill Gram...

FK: No...I'm not trying...

JP: Because you're the sick one...not me.

FK: No. I just don't want to hurt her. I don't want anybody to hurt her.

JP: But, you can hurt me?

FK: I'm sorry about that. I know that...uh...

JP: I need you to get...I won't say anything...but I need you to guarantee that this will never happen again, at least to anyone as young as me.

FK: No one honey, never. I said that…I guarantee you. I will even give that to you…in writing.

JP: You will give it to me in writing?

FK: I will…

JP: So you can guarantee that this will never ever happen again?

FK I promise…on Gram's…grave. I promise…to anybody.

JP: So, what, what should I do with myself? I mean, I can't just sit around thinking about this for the rest of my life…and…

FK: No…

JP: Being like this? Can I?

FK: Nope. And I don't know what…because huh (sigh)…I don't have an answer for you.

JP: I just want to know why you did this.

FK: I don't know. Because…um…

JP: I'm sick of you saying…(interrupted by FK)

FK: No…You're just a…

JP: that you don't know.

FK: No…(interrupted by JP)

JP: You have to know something?

FK: Because you're...

JP: You can't just ruin someone's life and tell them I don't know.

FK: No...because you...you attract me.

JP: I attract you?

FK: No. You were attractive like...is what I meant.

JP: You're fucking disgusting! I'm 16...you're how fucking old? That's disgusting!

FK: Uh...I know it is...very, very, and I told you that before.

JP: How do I know that you're not going to do this to me again? Are you suddenly not going to be attracted to me?

FK: I'm promising...

JP: No, I don't want you in my fucking house ever again!

FK: I have to go there occasionally...with Gram and stuff.

JP: NO! No...no.

FK: I have to.

JP: You have to...

FK: Yes. But I mean...not well...like I used to, but...

JP: I'm going to go...but...if I need to talk again...can I call you...because I have to talk about this and I already promised I wouldn't say anything.

FK: Yes you can talk to me...anytime. I'll talk to you.

JP: All right.

FK: If I can. Look, Jessica...never in my entire life will it ever happen to anybody.

JP: (mumbles something inaudible).

FK: Hmm?

JP: I believe you.

FK: I promise. Jessica, never. And I should try to figure out some way...to get it out of your mind for you. Someway I'll try to figure it out. If I have to talk...to somebody. Ok?

JP: Yup. All right.

FK: All right.

JP: All right.

FK: Bub-bye.

The phone beeps and the parties hang up.

[All ellipses (". . .") appear in original.]